

APR 18 1979

MICHAEL R. ROKAK, JR., CLERK

**APPENDIX****In the Supreme Court of the United States**

OCTOBER TERM, 1978

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**No. 78-904**

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**DEPOSIT GUARANTY NATIONAL BANK,  
JACKSON, MISSISSIPPI,***Petitioner,*

vs.

**ROBERT L. ROPER, ET AL.,***Respondents.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT**

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**Petition for Certiorari Filed November 29, 1978  
Certiorari Granted March 5, 1979**

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**DOCKET ENTRIES\***

[Docket 1-6]

<i>Date</i>	<i>Proceeding</i>
9/17/71	Complaint, original and four copies, filed.
11-17-71	Amended Complaint, original and four copies, filed.
1-6-72	Motion of Bankamerica Service Corporation to dismiss the Amended Complaint, with NOTICE that motion be heard on 1-19-72 at 9 AM, with certificate of service and Supplemental affidavit of D. R. McBride, with attachments, filed.
2-9-72	Motion of Jack E. Hudgins to enter appearance by additional named party plaintiff, with certificate of service, Attorneys were notified by Mrs. Swetman to contact Judge Nixon to arrange for hearing date for motion, filed.
2-23-72	Motion of Robert L. Roper to amend plaintiff's Complaint, with certificate of service, with NOTICE that motion be heard before Judge Nixon on 2-23-72 at 9 AM, with attached exhibit A, filed.
2-28-72	ORDER, dismissing as to BankAmerica Service Corporation, Bank of America National Trust & Savings Association, and National BankAmericard, Inc. No notice thereof save the entry of this Order being necessary, filed and entered in OB-1972, page 221. Copies mailed to attorneys, WLN
3-6-72	ORDER allowing amendment and plaintiff allowed 10 days, filed & ent in OB 1972-page 235-A.

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\*Entries relating to unsubstantial matters have been omitted.

<i>Date</i>	<i>Proceeding</i>
3-6-72	Amended complaint, original and two (2) copies, filed. (Class Action)
4-21-72	Motion for Order determining whether class action is to be maintained and for designation of class representative, with certificate of service, filed. No notice necessary at this time per WLN.
10-16-72	Memorandum Opinion and Order—1. The defts Motion for dismissal for lack of jurisdiction is denied. 2. Motion of deft. Bank for dismissal, or in alternative for change of venue, is denied. 3. Deft's Motion for Dismissal for improper joinder of causes [sic] of action or in alternative to strike and dismiss pltf's second cause of action is denied, filed and entered in OB-1972, pages 991-993. Copies mailed to attorneys. WLN (Copies mailed to attorneys.)
11-10-72	PROCEDURAL ORDER—1. Deposition of Defts. postponed until 11-15-72 at 2 PM. 2. Defts. not required to answer Interrogatories heretofore filed by pltf's until expiration of 30 days after ruling of Court on Pltf's Motion to proceed as class action. Defts required to answer amended complaint within 10 days from 11-6-72. 4. Deft's not required to elect whether to request trial by jury when filing answer but may, by notice, within 10 days after Court has ruled on Pltf's motion for class action, filed and entered on OB-1972, pages 1067-1068. Copies mailed to attorneys. WLN
11-17-72	Answer of Defendants to amend "Class Action Complaint", with certificate of service, with Exhibit A and B, filed.

<i>Date</i>	<i>Proceeding</i>
4-30-73	Appearance of Robert S. Vance, Jack C. Gallalee and Frederick G. Helmsing as counsel for plaintiffs [sic], with certificate of service, filed.
6-13-73	MEMORANDUM OPINION AND ORDER: Ordered that pltf's motion to maintain second cause of action as a class action is hereby denied; pltf's motion to allow Jack Hudgins to intervene as party pltf is granted; this Court reserves ruling on pltf's motion to maintain his first cause of action as a class action until completion of additional discovery directed to issues outlined herein; discovery is hereby reopened for this purpose and shall proceed in accordance with F.R.C.P.; although this Court anticipates the necessity of hearings directed to discovery issues, each side shall submit monthly reports by letter concerning progress of this discovery and suggested times for submission of supplemental briefs, filed and entered OB 1973, pages 696-701. (WLN (Copies mailed to attorneys))
8-9-73	Plaintiff's motion to allow associate counsel to appear pro hac vice, with certificate of service, with attached certificates of good standing of Robert S. Vance, Jack C. Gallalee and Frederick G. Helmsing, filed.
1-7-74	ORDER—plaintiffs given leave to file supplemental complaint seeking similar relief as original complaint—FURTHER—Defendants move, plead or otherwise respond to said supplemental complaint on or before 20 days after filing of same, filed and entered in OB-1974, page 17. Copies to attorneys.

<i>Date</i>	<i>Proceeding</i>
1-15-74	Supplemental complaint, with certificate of service filed.
2-5-74	Answer of defendants to supplemental complaint, with certificate of service, filed.
5-6-74	Motion of plaintiffs for partial summary judgment, filed.
7-5-74	Amended Motion for partial summary judgment as to issue of liability, with certificate of service, filed.
9-3-74	ORDER—consideration by Court of motions for partial summary judgment be abated pending final determination of Court as to whether this cause shall proceed as a class action under Rule 23, said abatement to be without prejudice to right of moving parties to renote said motions for hearing after final determination of class action issue before Court. Plaintiff may file a brief on this issue on or before September 30, 1974 and defts. may file a responsive brief on or before 14 days thereafter, filed and entered in OB-1974, pages 888-889. Copies to attorneys.
9-29-75	MEMORANDUM OPINION—Order to be entered, filed.
10-15-75	ORDER: Order Overruling Motion and Denying Class Action Status—It is ordered that motion of pltf and intervening pltf that this case proceed as a class be and it is hereby denied, and this cause shall proceed in all respects upon the indiv. complaints as in other cases, subject to a temporary stay of proceedings as ordered below. This Court being of the opinion that the decision denying class action status in this case

<i>Date</i>	<i>Proceeding</i>
	as evidenced by the Memorandum Opinion dated 9-27-75, and as further evidenced by this order, involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal to the Court of Appeals for the Fifth Circuit may materially advance the ultimate determination of the litigation; It is further ORDERED that the order denying certification of this case as a class action is hereby certified for appeal pursuant to 28 U.S.C., §1292, and all proceedings in this Court are hereby stayed for a period of 30 days pending possible appellate review of the said opinion and order, filed and entered in O.B. 1975, pages 1316-1317. Copies mailed to attys.
11-14-75	NOTICE OF APPEAL given that Robert L. Roper and Jack Hudgins, on behalf of themselves and all others similarly situated, plaintiffs named above appeal to the United States Court of Appeals for the 5th Circuit from the Order of the United States District Court for the Southern District of Ms. in the above-styled cause filed and entered on on 10-15-75 in which the Honorable Judge Nixon declined to permit the action to proceed as a class action, Certified copy to 5th Circuit Court.
11-14-75	Cash Bond in sum of \$250.00, filed.
11-17-75	Mimeo Notice of Appeal mailed to Bobbie Price with copies to Denton B. Jordan, Robert L. Daniels and William A. Davis.
12-12-75	ORDER—From Fifth Circuit Court of Appeals—leave to appeal from the interlocutory Order of

<i>Date</i>	<i>Proceeding</i>
	the U. S. District Court for the Southern District of Ms. entered on 10-14-75 is DENIED, filed and entered in OB-1975, page 1670.
1-16-76	ORDER—appeal of the plaintiffs noticed under 28 U.S.C. 1291 is hereby dismissed, filed and entered in OB-1976, page 47. Copies to attorneys.
3-12-76	Motion of Plaintiffs for Summary Judgment and attached NOTICE that motion be heard before a Judge on 3-25-76 at 10 AM in Biloxi, Ms., with certificate of service, filed.
3-17-76	Motion of defendants to strike plaintiffs' motion for Summary Judgment, with attached NOTICE that motion be heard before Judge Nixon on 3-25-76 at 10 AM at Biloxi, Ms., with certificate of service, filed.
5-10-76	Motion of plaintiffs for Summary Judgment, with attached NOTICE that motion be heard before Judge Nixon on 6-9-76 at 10 AM in Biloxi, Ms., with certificate of service, with attached Affidavit of Federal Reserve Discount Rate, with certificate of service, with attached Affidavit of G. Richard Thompson, Ph.D., supporting plaintiff's Motion for Summary Judgment, with certificate of service, with attached exhibits, filed.
6-1-76	Response of defendants to pltfs' Motion for Summary Judgment, with cert. of service, filed.
6-1-76	Offer of defendants to enter judgment as by consent and without waiver of defenses or admission of liability, with cert. of service and attachments, filed.

<i>Date</i>	<i>Proceeding</i>
6-9-76	INTERLOCUTORY ORDER On Plaintiffs' Motion for Summary Judgment and Defendants' Offer to Enter Judgment as by Consent: pltfs submit said calculation of amount for which judgment is to be entered within 14 days from 6-9-76, filed and entered in O.B. 1976, pages 823-824. Copies mailed to attys (copy handed to Vardeman Dunn).
6-9-76	ORDER: Second count of pltf's Complaint, as last amended, relating to the Federal Truth-in-Lending Act is dismissed with prejudice, filed and entered in O.B. 1976, page 836. Copies mailed to attys.
6-30-76	Plaintiffs' calculation of damages, with certificate of service, filed.
7-15-76	FINAL JUDGMENT on Plaintiffs' Motion for Summary Judgment and Defendants' Offer of Judgment as by Consent: Pltf Robert L. Roper recover of defts principal sum of \$683.30 plus legal interest in sum of \$206.12 making total of \$889.42 for which judgment is rendered plaintiff Jack Hudgins recover of defts principal sum of \$322.70 plus legal interest in sum of \$100.84 making total of \$423.54 for which judgment is rendered; judgment in favor of each of pltfs bear interest at 8% per annum from its date until paid and each of pltfs recover their costs of Court to be taxed by the Clerk; defts may discharge their liability by depositing sum awarded herein with Clerk of Court and may take Clerk's receipt therefor, and Clerk thereupon shall forthwith remit the amounts adjudged to respective parties on their request,

*Date Proceeding*

filed and entered in O.B. 1976, page 937-938.  
Copies mailed to attys.

- 7-15-76 Clerk's Receipt for Deposit in sum of \$889.42 for payment of judgment of Robert L. Roper and sum of \$423.54 for payment of judgment of Jack Hudgins, filed.
- 7-16-76 Bill of Costs in sum of \$1,427.52, filed.
- 7-16-76 Bill of Costs in sum of \$419.60, filed.
- 8-10-76 Notice of Appeal given that Robert L. Roper and Jack Hudgins, on behalf of all others similarly situated to themselves and on whose behalf the named plaintiffs sought class action treatment, appeal the Judgment entered herein on July 15, 1976, and all prior orders. A certified copy mailed to Fifth Circuit Court.
- 8-10-76 Cash Bond in sum of \$250.00, filed.
- 8-10-76 Mimeo Notice of Appeal mailed to Bobbie Price with copies to David Scott, Robert L. Daniels, Denton B. Jordan and William A. Davis.

IN THE  
UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

No. 4261 (N)

ROBERT L. ROPER, on behalf of himself and all  
others similarly situated,  
Plaintiff,

vs.

CONSERVE, INC., d/b/a BankAmericard Center, Jackson,  
Mississippi, and Deposit Guaranty National Bank,  
Jackson Mississippi, a body corporate,  
Defendants.

**AMENDED CLASS ACTION COMPLAINT**

(Filed March 6, 1972)

Comes now the above styled Plaintiff, representative Plaintiff, an adult resident citizen of Jackson County, Mississippi, who files this complaint on behalf of himself and all others similarly situated within the State of Mississippi against Deposit Guaranty National Bank of Jackson, Mississippi, a corporation, organized and doing business as Deposit Guaranty National Bank of Jackson, Mississippi, and Conserve, Inc., a wholly owned subsidiary of the said Deposit Guaranty National Bank of Jackson, Mississippi, service of process upon the said Deposit Guaranty National Bank of Jackson, Mississippi as well as the said Conserve, Inc., may be had by service of process upon any officer of the said Deposit Guaranty National Bank of Jackson, Mississippi.

## I

This cause of action arose within this District and Division. The Plaintiff's claim arises under Title 12 USCA, Section 85 and 86 and under Section 36, Chapter 2, *Mississippi Code, 1942*, as amended. This Court has jurisdiction of this cause without regard to the amount in controversy or the citizenship of the parties under the provisions of the Title 28, USCA, Section 1355, as well as other sections of the United States Code. The Defendant, The Deposit Guaranty National Bank of Jackson, Mississippi, is a National Bank subject to the provisions of the national bank act (Act June 3, 1964, c. 106, 13 stat. 99 et seq). All Defendants herein are subject to the laws of the State of Mississippi.

## II

The Defendant, Deposit Guaranty National Bank of Jackson, Mississippi (hereinafter referred to as DGNB), acts, in this jurisdiction, through Conserve, Inc., which is a wholly owned subsidiary of the said DGNB. The Defendants, and each of them, or the both of them, one acting as a division of the other, engage in the business of extending loans and credit through the use of the credit plan and credit card commonly referred to as "BankAmericard". The Defendants furnish such cards upon applications of persons, or, on occasions, without applications or request. In practice, the Defendants encourage numerous merchants, dealers, professionals, etc., to subscribe to their service whereby a holder of the card charges purchases to his BankAmericard and the Defendants pay such merchants, etc., after deducting a percentage of the charge to the merchants as a service charge, thereafter, the Defendants bill the card holder. If the holder fails to pay the account promptly, the Defendants charges the

holder interest, sometimes disguised or referred as "Finance" or "Service Charges, in the amount of one and one-half (1, 1/2%) per cent per month, (or eighteen per cent (18%) per annum), on the unpaid balance. This charge of interest is regularly made by the Defendants in the course of their business.

## III

Plaintiff on behalf of himself and all others similarly situated would show unto the Court that in the regular course of Defendants business the Defendants have willfully and knowingly taken, stipulated for, received, reserved and charged interest greater than that allowed by the laws of Mississippi, specifically section 36, Chapter 2, *Mississippi Code, 1942*, as amended, which, *inter alia*, provides that interest on all notes, accounts and contracts shall not exceed the rate of eight per cent (8%) per annum and if a greater rate of interest than eight per cent (8%) be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract is executed or executory. Said interest charged and received from Plaintiff and others similarly situated also exceeds the rate equal to one percentum or more to the discount rate on ninety day (90) commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the Defendant, DGNB, is located. Plaintiff, and other persons similarly situated within the State of Mississippi, have been charged, or are being charged, with such prohibited interest being in the amount of one and one-half (1 1/2%) interest per month on the unpaid balance of their accounts, or a total of eighteen per cent (18%) interest per annum, or more, if the said interest is compounded monthly.

## IV

This action is a Class Action provided for by rule 23 of the Federal Rules of Civil Procedure and is brought by the named Plaintiff on his own behalf and on behalf of all other persons similarly situated. The names, addresses, and number of similarly situated persons, being holders of BankAmericards within the State of Mississippi who have been charged such prohibited interest on the unpaid balance of their accounts, are unknown to the named Plaintiff, but are, on information and belief, averred to be in excess of ten thousand (10,000) persons. Such persons are known by the Defendants and may be readily determined by records maintained by Defendants.

## V

Claims of the Plaintiff and other persons similarly situated in this Class Action, are practically identical and represent substantially common questions of Law and fact. The common question of Law is whether the Defendants charged, or charge, or are charging, usurious interest in violation of Title 12, USCA, Section 85, and/or Section 36, Chapter 2, *Mississippi Code*, 1942, as amended. The common question of fact includes, but is not limited to, whether Plaintiff and other similarly situated as credit card holders, were charged, paid or billed, illegally, interest in excess of eight per cent (8%) per annum, or otherwise, all as set out above. The Allegations herein Represent a uniform and regular course of conduct engaged in by the Defendants against Plaintiff and members of the Class herein. The questions common to Plaintiff and members of the class predominate over any questions affecting individual members.

## VI

A class action is a superior method for a fair and effective adjudication of the controversy. Prosecution of the Claims as a class action will fairly and adequately protect the interests of all members of the class. The interests of the Plaintiff are identical to interests of all persons within the class. Prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to the individual plaintiffs, which would thereby establish incompatible standards of conduct for the Defendants. Maintenance of the action on behalf of the class would, as a practical matter, dispose of the interest of other the expense of trial and preparation therefor which require bringing separate actions. Plaintiff would show unto the Court that the Federal Court is a proper and just forum for the adjudication of the Claims of themselves and all others similarly situated inasmuch as a class action is not available in the state courts of the State of Mississippi; and the nature and type of the claims of the Plaintiff and all others similarly situated make it necessary that they be litigated in a class action because of the individual size thereof and the individual monetary amounts. Maintenance on behalf of the class would, as a practical matter, dispose of the interests of other members of the class not named as parties to this action and avoid the expense of trial and preparation therefor which require bringing separate actions.

## VII

Plaintiff alleges that the Clerk of this Court be designated custodian of the funds and judgment to be paid Plaintiff and other persons similarly situated, by Defendants and the Clerk deposit said funds in a suitable

depository and, upon proper order of this Court, disburse said funds after deduction of necessary expenses and attorney fees to Plaintiff's attorneys herein of twenty-five per cent (25%) of the amount so paid, the same being reasonable by all standards, including that alleged and utilized by Defendants in suing certain members in of the class in State Courts for unpaid accounts.

### VIII

#### SECOND CAUSE OF ACTION

And now for a Second Cause of Action Plaintiff on behalf of himself and all others similarly situated, realleges and reavers each and every, all and singular the allegations hereinabove made and for a second cause of action, reserving all rights and privileges, would show unto the Court that the Defendants, DGNB and Conserve, Inc. are liable to the members of the class for a failure to correctly specify the annual interest rate on its open credit extension accounts hereinabove mentioned, and would show unto the Court the following:

### IX

Plaintiff, on behalf of himself and all other similarly situated would show unto the Court that the Defendant Bank and its wholly owned subsidiary, Conserve, Inc., have violated the disclosure requirements of the Truth-In-Lending Act when they fail to show the proper annual percentage rate of interest on the front and face of the statement to the Plaintiff and all others similarly situated under their open-end Consumer Credit Plan. Plaintiff would show unto the Court on behalf of himself and all others similarly situated that although the statements furnished holders of BankAmericards on the face of them

state the interest thereto as a finance charge in conclusive and definite terms and states no finance charge is added to the first month or when balance is paid in full within twenty-five days after date of statement, said disclosures are inadequate.

### X

Plaintiff would further show unto the Court that the annual percentage rate as expressed on the monthly billing statement rendered by the Defendants is not a true proper or correct rate as charged by the Defendants. Plaintiff would show unto the Court on behalf of himself and the other members of the class that the actual percentage rate charged by the Defendants varies within any given monthly billing cycle period to such a degree that on occasions the Defendants will be charging 1.6, 1.7 or in some extreme cases 1.8% per month add-on percentage rate, which is grossly in excess of 1/4 of 1% more than 1 1/2% monthly add-on.

Plaintiff would show unto the Court that the DGNB and Conserve, Inc. are liable for violation of section 127 (B) (5) of the said Truth-In-Lending Act. Plaintiff would show unto the Court that the Defendants conduct is such as would preclude any "Good Faith" defense. Plaintiff, on behalf of the Class and himself would show unto the Court that the Defendants are in violation, therefore, of the Truth-In-Lending Act because, but not limited to, they have violated the requirements of Regulation "Z" (12 CFR 226) the same being regulations promulgated pursuant to the Truth-In-Lending Act. Plaintiff specifically charge the Defendants with violation of §226. 7(c), and other paragraphs setting forth the requirements of disclosure of annual percentage rate. Plaintiff alleges that the Defendants actually charge in excess of one-fourth of

one percent, on many occasions, above the stated 18% annual rate. Plaintiff charge Defendants with abjectly failing to state the true annual percentage rate within the nearest 1/4 or 1% on their statements as required by law.

#### DEMAND FOR JUDGMENT

WHEREFORE, Plaintiff on behalf of himself and all others similarly situated, demands judgment of Defendants, to wit:

1. The sum of \$5,000,000.00 together with interest according to law; or such other sum as represents the aggregate of the following (a) Twice the amount of interest paid within two years next preceding the filing of this complaint by all members of this class; and (b) such additional interest as has been charged to but not paid by members of the class within two years next preceding the filing of this complaint.

2. Any other remedies and relief afforded by the laws of the United States or the State of Mississippi which may be deemed appropriate by the Court.

3. Cost of this action as well as attorney fees in the amount of 25% as hereinabove alleged, or such other amount as may be deemed fit and proper by the Court.

4. Such other relief as the Court may deem just and proper.

Respectfully submitted,

Robert L. Roper, on behalf of himself, and all others similarly situated.

By: /s/ W. R. Wilson, J.  
Attorney at Law

P.O. Box 1507  
Pascagoula, Mississippi, 39567  
(601) 769-1247

and

Toxey Hall Smith, Jr.  
Attorney at Law

Wiggins, Mississippi  
(601) 928-4247

(Certificate of Service Omitted in Printing)

IN THE  
UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

(Title Omitted in Printing)

**MOTION FOR ORDER DETERMINING WHETHER  
CLASS ACTION IS TO BE MAINTAINED AND FOR  
DESIGNATION OF CLASS REPRESENTATIVE**

(Filed April 2, 1972)

Comes now Robert L. Roper, individually and on behalf of all others similarly situated, and moves, under the provisions of Rule 23 (c) (1) for an order determining whether this action is to be maintained as a class action and for designation as class representative and for other relief specified in said Rule.

Respectfully submitted,

Robert L. Roper, Behalf of Himself  
and all others similarly situated

By /s/Toxey H. Smith, Jr.

Attorney at Law

P. O. Drawer 8

Wiggins, Mississippi 39577

and

W. Robert Wilson, Jr.

Attorney at Law

3132 Canty Street, P.O. Box 1507

Pascagoula, Mississippi 39567

(Certificate of Service Omitted in Printing)

IN THE  
UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

(Title Omitted in Printing)

**ANSWER OF DEFENDANTS TO AMEND  
"CLASS ACTION COMPLAINT"**

(Filed November 17, 1972)

Now come the Defendants, Conserve, Inc., d/b/a BankAmericard Center, and Deposit Guaranty National Bank, and for answer to the Amended "Class Action Complaint" say:

*First Defense*

Answering specifically the allegations of the Amended Complaint, Defendants say:

1. They admit that the Deposit Guaranty National Bank is a national bank subject to the provisions of the National Bank Act. They deny that the Court has jurisdiction of the parties or subject matter, there being no diversity of citizenship and the amount involved being less than the jurisdictional minimum. They deny that the Court has venue.

2. They deny the allegations of Paragraph II except that they admit that Conserve, Inc. is a wholly owned subsidiary of Deposit Guaranty National Bank, and, further answering, would explain that charges are made to some of the merchants who subscribe to the BankAmericard service, said charges being in various amounts based on volume and ranging from 0 to 5%; and finance charges are made to consumer customers in varying amounts under

varying circumstances, with each account being different, depending upon numerous variables.

3. They deny the allegations of Paragraph III and would show that there are several statutes of the State of Mississippi dealing with permissible interest or finance charges including Chapter 662, Mississippi Laws of 1972, specifically authorizing charges of 1½% per month on revolving charge accounts such as the accounts involved herein.

4. They deny the allegations of Paragraph IV, except they admit that the holders of BankAmericard Credit Cards within the State of Mississippi exceed 10,000 and, in fact, equal approximately 90,000.

5. They deny the allegations of Paragraph V.

6. They deny the allegations of Paragraph VI.

7. They deny the allegations of Paragraph VII.  
[Answer to "Second Cause of Action"]

8. They deny the allegations of Paragraph VIII.

9. They deny the allegations of Paragraph IX.

10. They deny the allegations of Paragraph X.

#### *Second Defense*

If the Plaintiff otherwise would have a cause of action based on the charge of usury, which is denied, the Plaintiff is nevertheless barred by waiver and res judicata, and in support of this defense, Defendants would show:

In February of 1971, Conserve, Inc. filed an action in the County Court of Jackson County, Mississippi, being No. 12,033 on the docket of that Court against Robert L. Roper seeking recovery for the balance due on his Bank-

Americard Charge Account, plus attorney's fees. Robert L. Roper was duly served with a summons issued out of said Court to answer the declaration therein, but after entering an appearance, suffered default and failed to interpose a plea, defense or assertion of usury. A judgment was duly entered against Robert L. Roper in said cause in favor of Conserve, Inc. in the total amount of \$2,782.94, plus Court Costs, and said Judgment having been rendered by a court of competent jurisdiction, became and is a final Judgment and entitled as such to full faith and credit. A true copy of the official Record in said Cause No. 12,033 is attached hereto as Exhibit A and incorporated herein by reference.

If usury occurred in reference to the account of Robert L. Roper, which is denied, such was merged into the Judgment in said Cause No. 12,033.

Plaintiff's complaint in this cause amounts to a collateral attack on the final Judgment of the County Court of Jackson County, Mississippi, in said Cause No. 12,033 and as such, fails to state a claim on which relief can be granted.

#### *Third Defense*

As an additional defense to Plaintiff's "Second Cause of Action", Defendants plead that the action is barred by the applicable statute of limitations and herein would show:

Plaintiff's "Second Cause of Action" alleges violation of a Federal Statute known as the Federal Truth-In-Lending Act, 15 U.S.C. 1640, and Subdivision (e) of said Act provides in pertinent part that: "Any action under this section may be brought . . . within one year from the date of the occurrence of the violation."

Plaintiff's "Second Cause of Action" was not filed until March 6, 1972, when it was incorporated in the Plaintiff's "Amended Class Action Complaint" pursuant to leave granted on a motion for leave to amend filed February 23, 1972; but the last use made by Plaintiff of his BankAmericard account occurred more than one year prior to the last above mentioned date and is, therefore, barred under the provisions of 15 U.S.C. 1640 (e).

#### *Fourth Defense*

Defendants deny that this cause should be allowed to proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure or otherwise, but if the action is allowed to so proceed, Defendants reserve the right to defend and answer each and every claim which may thereby be brought into litigation herein, including the right as to each and all of such claims to interpose appropriate pleas of setoff and counterclaim.

#### SETOFF AND COUNTERCLAIM

Defendants aver that the Plaintiff, Robert L. Roper, is indebted to the Defendant, Deposit Guaranty National Bank, in the sum of \$2,812.44 as of April 14, 1971, which said indebtedness arises from the use by Plaintiff of a BankAmericard Credit Card and which indebtedness is evidenced by and merged into a final Judgment of the County Court of Jackson County, Mississippi, Exhibit A to this Answer, and if the Defendant is found to be liable to the Plaintiff, Defendants demand the right of setoff and aver that they are entitled to have the indebtedness aforesaid credited thereon.

#### ANSWER TO DEMAND FOR JUDGMENT

Defendants deny that Plaintiff is entitled to the relief demanded in his "Amended Class Action Complaint", and again deny that this action can properly be given the status of a class action under Rule 23 of the Federal Rules of Civil Procedure or otherwise.

Respectfully submitted,

/s/ Vardaman S. Dunn

1741 Deposit Guaranty Bank Bldg.  
Jackson, Mississippi

Attorney for Defendants, Conserve,  
Inc. and Deposit Guaranty Na-  
tional Bank

Of Counsel:

Cox & Dunn, Ltd.

1741 Deposit Guaranty Bank Building  
Jackson, Mississippi

(Certificate of Service Omitted in Printing)

(Exhibits Omitted As Irrelevant to Issue)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

(Title Omitted in Printing)

**SUPPLEMENTAL COMPLAINT**

(Filed January 15, 1974)

COME NOW, the Plaintiffs, Robert L. Roper and Jack Hudgins, on behalf of themselves and all others similarly situated, and file this Supplemental Complaint and for cause of action would show unto the Court the following facts, to-wit:

**I.**

Plaintiffs reallege and reaver, each and every, all and singular, every allegation of the original and amended complaints and incorporate the same herein by reference as if fully copied in words and figures herein.

**II.**

The named Plaintiffs on behalf of themselves and all others similarly situated, would show unto the Court that the Defendants, Conserve, Inc. and Deposit Guaranty National Bank, have continued to exact interest in the same manner, style and fashion as alleged in the preceding complaints and that they have continued to do so from the date of the filing of the original lawsuit down to, until, and including the present, and that the named Plaintiffs on behalf of themselves and the class would show unto the Court that the same relief prayed for and sought in the original and amended complaints should and ought to be granted to them and the class for the period between the filing of the lawsuit and the date of the filing of the supplemental complaint, all as provided for by law.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs sue and demand judgment on behalf of themselves and all others similarly situated in the same manner, style and fashion as sought in the original complaint and amended complaints for a supplemental period including the period from the date of the filing of the original lawsuit down to the date of the filing hereof, and Plaintiffs sue and demand damages for themselves and the class in double the amount of interest exacted from them and the class from the time of the filing of the original lawsuit down to, until and including the date of the filing of this supplemental complaint, and Plaintiffs pray on behalf of themselves and all others similarly situated that the interest charged but not yet collected be forfeited, and;

PLAINTIFFS PRAY that this Honorable Court set a reasonable attorneys fee out of the award to the class as the Court may deem fit and proper, and;

PLAINTIFFS RENEW THEIR DEMAND FOR JUDGMENT as set forth in the original complaint and the amended complaints filed subsequent thereto, in addition to the relief sought and demanded in this supplemental complaint.

Respectfully submitted,

Robert L. Roper and Jack Hudgins

By: /s/ Toxey Hall Smith, Jr.

Attorney at Law

114 Cavers Street

Wiggins, Mississippi

(601) 928-3222

and

W. Roberts Wilson, Jr.  
 Attorney at Law  
 P. O. Box 1507  
 Pascagoula, Mississippi 39567  
 (601) 769-1247

(Of Counsel, Robert Vance, Frederick Helmsing and Jack Gallalee)

By: /s/ Roberts Wilson, Jr.  
 Of Counsel

(Certificate of Service Omitted in Printing)

IN THE  
 UNITED STATES DISTRICT COURT FOR THE  
 SOUTHERN DISTRICT OF MISSISSIPPI  
 SOUTHERN DIVISION

(Title Omitted in Printing)

**ANSWER OF DEFENDANTS TO  
 "SUPPLEMENTAL COMPLAINT"**

(Filed February 5, 1974)

Without waiver of objections to jurisdiction or venue, and without waiver of the objections to the maintenance of this suit as a "class action", defendants answer the Supplemental Complaint as follows:

**FIRST DEFENSE**

The Supplemental Complaint fails to state a claim against defendants upon which relief can be granted.

**SECOND DEFENSE**

Neither the original plaintiff, Robert L. Roper, nor the intervening complainant, Jack Hudgins, has standing

to maintain the alleged cause of action set forth in the Supplemental Complaint for the reason that neither the original plaintiff nor the intervening plaintiff has transacted any credit card business with defendants since the filing of the Amended Complaint in this cause on March 6, 1972, and neither the original plaintiff nor the intervening plaintiff held a credit card during said period of time encompassed by the Supplemental Complaint.

**THIRD DEFENSE**

Defendants deny that this cause should be allowed to proceed as a class action under Rule 23 of the *Federal Rules of Civil Procedure*, or otherwise, but if the action is allowed to proceed under the Supplemental Complaint, defendants reserve the right to defend and answer each and every claim which may thereby be brought into litigation herein, including, as to each and all of such claims, the right to interpose appropriate pleas of set-off and counterclaim and to have all issues heard by a jury.

**FOURTH DEFENSE**

Answering specifically the allegations of the Supplemental Complaint, defendants say:

1. Paragraph number 1 of the Supplemental Complaint re-alleges and re-avers each and every and all and singular every allegation of the original and amended complaints and incorporates the same by reference; and in answer to this paragraph defendants re-allege and re-aver each and every, all and singular, every allegation, admission and denial of their answers to the original and amended complaints and incorporate the same herein by reference as if fully copied in words and figures herein; and defendants further incorporate as a part of their an-

swer all of the motions, pleas and objections heretofore filed in this cause and by reference make the same fully applicable to the Supplemental Complaint as if re-filed with this answer.

2. Answering paragraph 2, they admit that Deposit Guaranty National Bank has continued to do business under its credit card program in generally a similar manner, style and fashion as its business was conducted prior to the date of the filing of the last amended complaint herein, but they deny all of the remaining allegations of this paragraph of the Supplemental Complaint.

#### SET-OFF AND COUNTERCLAIM

As a part of the answer to the Supplemental Complaint defendants re-assert the set-off and counterclaim as incorporated in the answer of defendants to the amended "class action complaint."

#### ANSWER TO DEMAND FOR JUDGMENT

Defendants deny that plaintiffs are entitled to the relief demanded in the "Supplemental Complaint" and again deny that this action can properly be given the status of a class action under Rule 23 of the *Federal Rules of Civil Procedure*, or otherwise.

Respectfully submitted,

/s/ Vardaman S. Dunn

Attorney for Defendants

Of counsel:

Cox & Dunn, Ltd.

Post Office Box 1046

Jackson, Mississippi 39205

(Certificate of Service Omitted in Printing)

#### UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION

(Title Omitted in Printing)

#### MEMORANDUM ORDER

(Filed September 29, 1975)

The original plaintiff, Robert L. Roper, and the intervening plaintiff, Jack E. Hudgins, former customers and "Bankamericard" card holders of the defendant, Deposit Guaranty National Bank of Jackson, Mississippi, brought this suit against the defendants on behalf of themselves and other Bankamericard card holders of the defendants. It was designated as a class action under Rule 23, Federal Rules of Civil Procedure, and although it named both of the above defendants, the real party in interest is Deposit Guaranty National Bank (Bank).

The Complaint sets forth two causes of action, the first of which alleges violations of the sections of the National Banking Act dealing with interest charges and penalties for exacting usury, 12 U.S.C. §§85 and 86; the second cause of action is based upon alleged violations of the federal Truth-in-Lending Act, 15 U.S.C. §1601, et seq.

The violations of law for which this action was brought were alleged to have been committed by the Bank in the administration of its credit card program known as "Bankamericard", which was inaugurated in 1968 and which developed between 90,000 and 100,000 individual credit card accounts.

Plaintiffs seek to qualify and act as class representatives for all Bankamericard credit card holders whose accounts were active within the four year period covered by the original and supplemental complaints filed herein,

or from September 18, 1969 until September 19, 1973. It is conceded by both sides that there were 90,000 or more card holders during this period of time. Furthermore, it is agreed that the defendant Bank is subject to the provisions of the National Bank Act of June 3, 1964, c. 106, 12 Stat 99 (Tit. 12 U.S.C. §1 ff).

This cause is now before the Court on the motion of the plaintiff for an order certifying this as a class action and for designation of a class representative. This Court initially found that neither the plaintiffs' first nor second cause of action could be maintained as a class action under Rule 23 and ordered that the motion to maintain the second cause of action based upon an alleged violation of the Truth-in-Lending Act as a class action be denied but reserved final decision on the class action question as related to the usury issue until the record was fully developed on the question of the over-all manageability of the case as a class action.

The parties have fully utilized all desired discovery, including taking of depositions, and have filed herein additional affidavits. These have been considered along with the evidence previously submitted, and in addition, the Court and counsel have engaged in several conferences following which both sides have submitted excellent briefs and have orally argued all facets of this matter.

The Court is now called upon to determine whether the conditions of Rule 23 have been met, including whether a class action under the circumstances of this case is superior to other available methods for the fair and efficient adjudication of this controversy which must be resolved by the exercise of an informed and sound discretion within the guidelines of the rule and cases construing it, taking due care in the process to avoid encroaching upon the substantive law of the forum to the extent that it

applies to the case sub judice and has not been pre-empted by federal law.

Before proceeding to decide this class action question, the Court notes that the merit issues herein include whether the so-called service charge is subject to Mississippi statutes on usury; what rate of interest is allowable on loans of credit; whether the effective rate actually paid in any given case is to be determined on a daily, monthly or other basis; and whether the rate so determined was exceeded in any given individual case. The Court may not proceed to decide these issues as long as the class action status of this case remains unanswered, because no merits determination of fact or law can be made without due process notice to all identifiable members of the proposed class, if this is determined to be a proper class action. *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140; 417 U.S. 156 (1974); *Miller v. Mackey International*, 452 F.2d 424 (5th Cir. 1971).

A modern credit card system such as the Bankamericard system is made possible by the utilization of computer technology. Individual customers apply to a participating bank which is part of the Bankamericard system for the extension of credit by the issuance to the applying customer of a credit card. The bank also makes contracts with merchants and vendors of goods and services. A card holder may purchase goods or services from any participating merchant or various member establishments anywhere in the world and charge his purchase on his credit card.

After an individual holder of a card issued by this defendant charges goods or merchandise, his charge ticket is deposited by the selling merchant at the bank with which such merchant has contracted and the latter is given credit to its account for the amount of the charge ticket

less an agreed discount. If the bank is one other than the defendant, the ticket is transmitted through normal banking channels to the defendant and appropriate funds or credits are transferred by it to the transmitting bank. When the ticket reaches the defendant Bank, it is fed into its computer and is thereby charged to the card holder's account.

Once the purchase is made the customer is granted several choices or options. The customer determines the timing of his purchases or borrowings. If he is billed at the end of each month, a purchase made near the first of the month is not billed for almost thirty days. When he receives the billing, he may wait thirty additional days to pay without incurring any service charge and about 35% of the bank's customers do not incur any service charge at all. In any event, there is no service charge for the period from the date of purchase to a date which is thirty (30) days after the initial billing, which allows a free credit use period of up to approximately sixty (60) days, depending on the timing of the purchase in relation to the billing date. In many instances, delayed deposits of charge drafts by the merchants can extend this free time up to ninety (90) days. If the customer does not choose in any given month to pay that month's billing in full at the end of thirty days after billing, he may elect to pay in installments, and it is within his discretion to determine the amount of the first payment, subject to a minimum requirement. He may pay the minimum (\$10.00 or 5%) or any amount between 5% and 100% and vary this at will from month to month. A service charge is then applied on the remaining balance and it appears on the next billing. Different customers have different paying preferences and the preferences may be changed and varied at the option of the customer provided the payments do not fall below the minimum required.

On the date appointed for billing of a particular card holder's account, the computer is programmed to add charges, subtract credits, add any finance charge due under the defendant's contract with the customer and generate a statement reflecting all such transactions. This statement, together with all of the customer's charge tickets which have accumulated since his last billing are then mailed to him. The data which the computer tapes contain are updated from period to period as the process goes on. Transaction data is not permanently retained on the magnetic tapes. Data is printed and retained in the form of "printouts" which are generated many times throughout a billing cycle and on microfilm which is made of all charge tickets, credit transactions and statements.

From the procedure outlined above, it is apparent that the effective rate of service charges actually paid will vary from one account to another and within each account from month to month or from time to time. Indeed, the witness called by plaintiff as an expert admitted that in view of these options and variables, the effective rate paid would vary from month to month and from day to day and there would be some periods where the effective rate paid would be above and some where it would be below even 8% simple interest. To determine this crucial question of the effective rate actually paid, a reconstruction of each account, either totally or in some substantial respect, would be necessary before the Court or a jury could determine either liability or amount.

The cost of researching and reconstructing 90,000 accounts, each involving numerous transactions, from microfilm records, is the subject of estimates which vary widely, due in some part to disagreement as to the extent of the reconstruction required and the method to be used, but in any event, the cost in time and money is very sub-

stantial, ranging from \$367,700.00 to over \$3,432,000.00 to cover the four year period.

Even preliminary to this endeavor is the matter of giving notice to at least 90,000 potential class plaintiffs, the cost of which is also substantial.

Another facet of the case has to do with the ability of potential class member plaintiffs to secure relief, if any is due, outside of the class action arena. Pertinent to this question is the fact that Mississippi provides small claims courts conveniently throughout the state which handle a multitude of small claims such as those which might arise from usury. The amount of individual claims over the four year suit period will, of course, vary, but if usury has been committed, as the plaintiff claims, in respect to all finance charges at the rate of 18% per annum, most, if not all individual claims would be substantial. With claims outgrowing from accounts with average balances of \$100.00 to \$1,000.00, the ad damnum at 18% per annum (doubled) would range from a low of \$144.00 to a high of \$2,880.00, plus pre-judgment legal interest, and fall within the jurisdiction of justice courts, county courts and circuit courts, depending upon amounts. Many lawyers throughout the state habitually handle cases in this range. Unlike the highly complex anti-trust cases which have found more than average favor as class actions, there is nothing unduly complex involved in prosecuting actions based on claims for usury. If a case has merit, both client and lawyer make recoveries adequate to justify litigation on an individual case basis. On an equal division arrangement, the client still recovers all interest paid, plus legal interest from the date paid. The lawyer recovers a like amount for his services, because of the 100% penalty which is mandatory in all usury recoveries against national banks.

Against this factual background, the Court will proceed to a discussion of the reasons which have influenced the Court's decision to reject the use of the class action device under Rule 23 in this case.

Under Rule 23, the Court must first determine whether the prerequisites of subpart (a) have been met and additionally whether at least one of the three provisions of subpart (b) is applicable. In reaching a conclusion, the Court adopted a pragmatic approach in an earnest effort to balance the spirit of the Rule with fundamental rights and traditional notions of fair play and equal justice for all alike.

The burden of proof and of persuasion rests throughout upon the plaintiff who seeks to represent a class of numerous individuals. *Poindexter v. Teubert*, 462 F.2d 1096 (CA4, 1972); *Rossin v. Southern Union Gas Co.*, 472 F.2d 707 (CA10, 1973). The broad terms of Rule 23 have been recognized as calling for the exercise of some considerable discretion of a pragmatic nature. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D. N.Y. 1972). See also: *Shumate & Co. v. National Assn. of Securities Dealers*, 509 F.2d 147 (CA5, 1975).

Speaking for the Court in *Eisen III* (*Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (CA2, 1973)), Judge Medina observed that "[c]lass actions have sprouted and multiplied like the leaves of the green bay tree" and the blame is placed in part upon the "erroneous and frustrating view" that some way "must" be found to entertain the case as a class action. There is no compulsion written into Rule 23.

On the contrary, the compulsion is to search the facts of each case to determine whether justice to all and the efficient administration of justice will best be served by the use of such a device in the circumstances of the particular case at hand.

In this connection, it is not irrelevant to consider who is to benefit and who is to suffer and how and to what extent.

Another consideration is the effect of the class action device on the defendant who finds himself suddenly confronted with thousands of lawsuits, all built into one, and who is faced with claims for damages and penalties reaching astronomical amounts, in this case \$14,000,000.00, of which one-half is a statutory penalty,—enough to seriously endanger if not to destroy the very solvency of the bank. The threat implicit in this situation has been referred to as “legalized blackmail.” *Eisen III*, 479 F.2d at 1019.

Other courts have placed emphasis upon the undesirable “horrendous penalty” that can be generated by the pursuit of class actions to recover damages and penalties. Cf. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D. N.Y.) 1972); *Rogers v. Coburn Finance Corp.*, 54 F.R.D. 417 (N.D. Ga. 1972); *Gerlach v. Allstate Ins. Co.*, 338 F.Supp. 642 (S.D. Fla. 1972). When suffering on one side is intense and the benefit on the other is minimal, if any, the Court must proceed with due caution to avoid an injustice, especially when it appears, as here, that each individual who may have an interest is free and able to pursue his own remedy.

In sum, the allowance of class action status in this case will threaten the defendant with a horrendous penalty, and will benefit individual customers little, if at all. On the other hand, to deny the motion will harm no one who sincerely desires to prosecute a claim against the bank, because the statute of limitations has been suspended (*American Pipe and Const. Co. v. Utah*), 94 S.Ct. 756, 414 U.S. 538 (1974)), and everyone has a forum available for prosecution of his claim in the traditional manner.

This brings the Court to the question of whether the case is manageable as a class action and the related question of whether common questions predominate.

One directive of Rule 23 is that the Court evaluate “the difficulties likely to be encountered in the management of a class action.” Commenting upon the quoted directive the Supreme Court in its review of *Eisen III* (*Eisen v. Carlisle and Jacquelin*, 94 S.Ct. 2140, 417 U.S. 156 (1974)) said:

“... Commonly referred to as ‘manageability,’ this consideration encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit. . . .” (94 S.Ct. at 2146, 417 U.S. at 164).

The *Eisen* cases, both *Eisen II* and *Eisen III*, include one admonition which deserves threshold emphasis. Judge Lumbard, in his dissenting opinion in *Eisen II* (*Eisen v. Carlisle and Jacquelin*, 391 F.2d 555 (CA2 1968)), observed:

“... Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. . . .” (391 F.2d at 572).

The majority in its opinion in *Eisen III* (*Eisen v. Carlisle and Jacquelin*, 479 F.2d 1005 (CA2 1973)) sounded the same note with the observation:

“... Much of this time was devoted to an effort by Eisen’s counsel to meet the apparently insurmountable difficulties of notice and manageability by adopting the erroneous and frustrating view that some way must be found to make the case viable as a class action. . . .” (479 F.2d at 1008).

In its review of *Eisen III*, the Supreme Court of the United States indicated no disagreement whatever with the stated truism. Moreover, this series of decisions, including that of the Supreme Court of the United States, makes it clear that in making the determination of the lack of manageability and superiority and of other necessary prerequisites to the class action approach, the so-called "class" does not ever become a legal entity or a litigant apart from the individual members of the class.

In short, even if the present action wears the cloak of a class action, the individuals composing the class still must be dealt with as individuals and each individual's case must stand or fall upon its own merits.

As a predicate for developing the testimony of the witness offered by plaintiff as a computer expert, the plaintiff's ultimate contention or theory of the case was stated into the record as follows:

"... The contention is that the only relevant factors in computing the refund are the amount of service charges or finance charges billed during the suit period and the amount paid during the suit period." (Copeland dep., p. 46).

Looking solely to these factors asserted as the "only relevant factors," plaintiff would limit the case in its first stage to a computation of the dollars paid by *all* credit card customers in response to service charges for the suit period (initially 24 months but expanded by supplemental complaint to four years). The total of all service charges for all accounts for the four year period, fairly estimated at \$7,000,000.00, would then be multiplied by two to create a \$14,000,000.00 "fund" which which the bank would be expected to pay into Court or disburse as directed, after, of course deducting attorneys' fees to plaintiff's counsel

and other expenses incurred in administration of the case. In phase two, a calculation of dollars paid during the suit period by each customer is contemplated and the amount, after deducting attorneys' fees and expenses, prorated in some fashion not explained, would then be automatically disbursed. All of this, according to the plaintiff, is to be done by devising new programs for the bank's computers.

One trouble with the plaintiff's approach thus far is that there is and can be no cause of action for recovery of interest *charged* but only for recovery of interest *paid*. In order to amount to actionable usury, the dollars paid must convert into an *effective* percentage rate which exceeds the maximum per annum percentage rate found to be allowed by the law. In this case, the dollar amount charged or paid may or may not convert into an effective percentage rate in excess of the rate found to be allowed by law, depending upon the rate charges in relation to the time the transactional credit is used by the borrower or customer.

The alternative is to examine and reconstruct each card holder account, which cannot be done without examining each transaction from the microfilm records and either producing copies of each document involved or key-punching the detailed information therefrom into a re-programmed computer system, the cost and time for which varies from several hundred thousand to several million dollars.

This case is different from one where liability can be shown as to all class members, with only the amount of damages to be determined as to each. *Shumate & Co. v. Nat. Assn. of Security Dealers*, 509 F.2d 147 (CA5, 1975).

This Court rejects plaintiff's contrary premise and finds as a fact that each account would have to be recon-

structed and individually examined in order to determine liability on the charge of usury as well as the amount in case liability were found to exist. In other words, the Court would be faced with some 90,000 separate cases for trial, possibly by jury, on issues first of liability and then on damages, and there is no way that the defendant may be computerized into mass liability or mass damages in the circumstances of this case. In addition, there are some 11,000 delinquent accounts involved, which would or could become counterclaims and require adjudication. Issues of fact affecting only individual members of the class clearly predominate.

The possibility that the defendant, faced with the enormous task of defending these thousands of claims, might be pressured into a compromise settlement or even a compromise on procedure to minimize the enormous cost and disruption of its normal business functions is not a result to be either forced or applauded by this Court. Nor is the Court called upon to run the substantial risk of another *Eisen* "Frankenstein monster posing as a class action." (*Eisen II*, 391 F.2d at 572; *Eisen III*, 94 S.Ct. at 2148, 417 U.S. at 169).

Since the plaintiffs seek to represent a class of individuals who are strangers and who have no voice in the selection of a class champion, the Court is obliged to look closely to the ability of the plaintiffs to adequately represent the class. It is not enough that competent lawyers have committed themselves to the legal representation, although the existence of competent counsel is certainly a prerequisite to adequate representation. In the instant case, the Court is concerned that the stake of the nominal plaintiffs is small and there is no showing that they are either willing or able to finance the litigation as a class action. At the very least, a large sum must be committed

at the front end of a class action approach to provide the notice to the class members which due process requires. *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140, 417 U.S. 156 (1974). The postage alone on 90,000 notices would equal \$9,000.00 and the cost of labor and supplies would be quite substantial, and this is only the beginning of economic problems which would plague the case as a class action requiring reconstruction in some form of 90,000 odd accounts over a four year period.

At a conference with the Court, the lawyers for the nominal plaintiffs indicated a willingness to advance the cost of the notice and look to their clients for repayment if the case were lost, but to expect the Court to assume that the nominal plaintiff, with very little involved, would be willing or expected to discharge the client's liability to reimburse the attorneys is too much. This may be to prefer rich representatives to poor ones, but in this type of case there is no compulsion that there be a representative at all and if there is to be one, he must have the ability, economic and otherwise, to serve in his self-appointed position. Cf. *P.D.Q. Inc. of Miami v. Nissan Motor Corporation In U.S.A.*, 61 F.R.D. 372 (S.D. Fla. 1973), and *Sayre v. Abraham Lincoln Federal Savings & Loan Assn.*, 65 F.R.D. 379 (E.D. Pa. 1974).

Finally, the Court must determine whether the procedural device, if applied in the circumstances of this case, would do violence to the substantive law made applicable to claims for the penalty of usury by state statutes and decisions, because Rule 23, like the other federal rules of civil procedure, may not abridge, enlarge or modify any substantive right. 28 U.S.C. §2072. As pointed out in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1014 (CA2 1973):

"... Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.'" (28 U.S.C. §2072).

Generally, the receipt of interest for the loan of credit is not inherently evil. The common law did not condemn the practice or limit the amount. 55 *Am. Jur.* 324; §3. Usury laws derived from the efforts of local lawmakers to strike a balance of fairness to lenders and borrowers alike, having due regard to the economic necessities in the particular locality involved. The right of the states to legislate and formulate public policy in this area cannot be disputed and the right to legislate and determine policy includes the incidental right to condition or limit enforcement of enacted usury laws expressly and by a judicial policy determination.

If Mississippi has an ascertainable policy for determining what is or is not a "fair" method for adjudicating the extent of the accountability of lenders who are alleged to have received excessive interest under state law, then that policy cannot be ignored either as substantive law or as bearing upon the question of whether a Rule 23 aggregation against the lender is superior for the required "fair" adjudication of the controversy.<sup>1</sup>

1. An overwhelming number of courts have ruled against requested spurious class action treatment of Truth-in-Lending actions. See *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (CA3), cert. den. 419 U.S. 885 (1974). One reason is that the policy underlying the law is inconsistent with an aggregation of claims to produce excessive penalties. Analogizing, this Court perceives no good reason why like respect should not be accorded to state policy where state laws are invoked as a basis for recovery.

The Court concludes that under the substantive law of Mississippi, claims for usury are currently viewed as actions for a penalty and are strictly personal to the borrower and that the action may not be maintained by anyone except the borrower or his legal representative in the traditional sense and that the claim is not subject to assignment to another for collection or otherwise. Specifically, Mississippi law denounces the aggregation of individual usury claims as a "legal fraud" upon, and therefore as being *unfair* to the lender.

The aggregation of usury claims is against public policy in Mississippi and is stoutly condemned by its case law.<sup>2</sup> A leading case is *Fry v. Layton*, 191 Miss. 17, 2 So.2d 561, 134 A.L.R. 1330 (1941).

In this case the plaintiff, Fry, was a customer of and borrower from the defendant Layton, who was in the small loan business. He filed a suit seeking recovery for usury paid on his own loan and for that paid by eighteen other customers similarly situated who had assigned their claim to him. The Court held that Fry could not recover usury paid as assignee of others similarly situated. This was not grounded on procedure but upon the substantive policy and law of Mississippi as it relates to usury actions. The Court said:

"As was said by this Court in *Byrd et al v. Newcomb Mill & Lbr. Co.*, 118 Miss. 179, 79 So. 100, 101: 'The statute protects and safeguards the borrower by penalizing sharply the lender in the usurious contract; but it was not meant to give to the borrower any unjust advantage of the lender. Its good purpose

2. There is a sharp conflict of authority on the question of whether an action for usury is exclusively personal and nonassignable, but Mississippi takes a positive stand on the point. See Anno. 82 A.L.R. 1008 and 134 A.L.R. 1335.

should not be perverted into a source of legal fraud by borrowers upon lenders.'"

The Court concluded:

"We hold that appellee, as assignee, cannot recover on these claims, but since he appears to have been the borrower upon two of them, the case is reversed and remanded." (2 So.2d at 565).

See also: *Liddell v. Litton Systems, Inc.*, 300 So.2d 455 (1974), citing and following *Fry v. Layton*, *supra*, wherein the Court said:

"This Court has held that the forfeiture provisions of the usury laws are highly penal in nature and must be strictly construed. (Citing cases)." (300 So.2d at 456).

There is nothing contra in the National Banking Act. The federal law fixes no interest rate limits apart from local law and condemns no usury apart from state law. The federal statutes reach only to the point of assuring that national banks are not treated less favorably than state banks or other competitive lenders in the interest charge area and of limiting the penalty for violating state usury laws, in any event, to double the amount of interest actually paid. Indeed, like Mississippi, the National Banking Act expressly limits the right to sue for usury to "the person by whom it has been paid or his legal representative," 12 U.S.C. 86, again leaving to state law the question of who is a "legal representative" who may maintain such an action. See *Louisville Trust Co. v. Kentucky National Bank*, 87 Fed. 143 (D. Ky. 1898), and cases annotated to 28 U.S.C. §86. State laws differ as to the definition of a "legal representative", but Mississippi happens to limit the term to exclude even voluntary assignees of borrowers,

to the ultimate substantive end that the lender may not be faced in any case with an aggregation of claims for the usury penalty in the hands of a stranger to the individual loan transactions, such being viewed as a "legal fraud". *Fry v. Layton*, *supra*, and *Liddell v. Litton Systems, Inc.*, *supra*. There is no indication of a Congressional interest to encourage litigation in this area or to override state policy.

Since the Mississippi statute law alone determines the matters of both interest and the existence of liability for usury and since Mississippi prescribes conditions to the invocation of its consequent penalties, we deal with substantive law and Rule 23, being neither substantive nor compulsory, does not stand in the way or justify the Court in violating the established policy of the state. To do so would not only be contrary to the Enabling Act under which the rules were adopted but would be to sanction invidious discrimination against national banks in this area, contrary to the letter and spirit of the National Banking Act.<sup>3</sup>

Moreover, the Court would be hard pressed to conclude that the aggregation of usury claims against this national

3. Attempted federal court actions against state banks or other lenders would fail in most cases for lack of the minimum jurisdictional amount, if not for lack of diversity. Cf. *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053 (1969). If the federal court should allow aggregation of claims for usury against national banks, viewed by Mississippi as a "legal fraud" and non-maintainable under its usury laws, the result would be to allow the perpetration of legal frauds by local standards upon national banks but not upon state banks or local lenders, since these could not be reached by the Rule 23 procedural device. Cf. *Union National Bank v. Louisville N.A. & C. Ry. Co.*, 163 U.S. 325, 16 S.Ct. 1039 (1896); *Daggs v. Phoenix National Bank*, 177 U.S. 549, 20 S.Ct. 732 (1900). On the point that local law determines who may maintain an action for usury, to the end that equal treatment may be had by all, see *Meadow Brook National Bank v. Recile*, 302 F.Supp. 62 (E.D. La. 1969); *Municipal Leasing Systems v. Northampton National Bank of Easton*, 382 F.Supp. 968 (E.D. Pa. 1974).

bank was superior for the "fair" adjudication of the controversy in the very face of the clear holding of the Mississippi Court that such amounts to a "legal fraud" by borrowers contrary to the intent of the state's statutes on usury. Rule 23 was not designed as a device to perpetrate a legal fraud.

Turning, finally, in partial summary, to the specifics of Rule 23, the Court finds that the numerosity, commonality and typicality requirements of subpart (a) are present but that the plaintiffs cannot fairly and adequately protect the interests of the class, because they are neither able nor willing to finance the case as a class action.

Subparts (b) (1) and (2) are inapplicable. See *Goldman v. The First National Bank of Chicago*, 56 F.R.D. 587 (N.D. Ill. 1972); *Kenny v. Landis Financial Group, Inc.*, 349 F.Supp. 939 (N.D. Iowa, 1972); *Eisen III*, 479 F.2d 1005 (CA 2 1973); *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140, 417 U.S. 156 (1974), footnote 4.

Subpart (b) (3) conditions have not been met. The proof fails to show that questions of law or fact common to members of the class predominate over questions affecting only individual members. While there are some questions common to all, each individual case presents its own questions of fact and its own problems on issues of both liability and damages. By pragmatic standards, the case is unmanageable as a class action.

A class action is not superior to other available methods for the fair and efficient adjudication of the controversy, especially in view of (1) the availability of traditional procedures for prosecuting individual actions and the undesirability of concentrating the litigation of claims in this federal forum; (2) the substantive law and policy of the state which views the aggregation of usury claims as a

"legal fraud" and unfair to the lender; (3) the invidious banks in the enforcement of usury laws contrary to the discrimination which would be imposed upon national intent of the National Banking Act; (4) the horrendous penalty sought to be imposed, which could result in destruction of the bank and benefit no one substantially other than the attorneys and (5) the tremendous burden which would be imposed upon the Court in attempting to handle 90,000 claims to the detriment of other deserving litigants who have at least equal claim upon the Court's time and energies.

The motion for an order that this case proceed as a class action is denied. The cause will proceed upon the individual complaints as in other cases.

We are of the opinion that this Opinion and the Order which will be entered pursuant hereto involve a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal may materially advance the ultimate determination of the litigation. The order denying certification of this case as a class action is hereby certified for appeal pursuant to 28 U.S.C. §1292 and all proceedings in this Court are hereby stayed for a period of thirty (30) days pending possible appellate review of this Opinion and Order to be entered pursuant hereto.

This 27th day of September, 1975 at Biloxi, Mississippi.

/s/ Walter L. Nixon, Jr.

United States District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

(Title Omitted in Printing)

**ORDER OVERRULING MOTION AND DENYING  
CLASS ACTION STATUS**

(Filed October 15, 1975)

Came on to be heard the motion of the plaintiff and intervening plaintiff for an order allowing this action to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, and the Court having heard and considered the said motion on the evidence, both oral and documentary, and having considered the briefs and arguments of counsel and finding that this action should not be allowed to proceed as a class action for the reasons set forth in the Memorandum Opinion dated September 27, 1975 as filed in this cause, which said Memorandum Opinion is incorporated herein by reference but that this order should be certified for possible appeal under 28 U.S.C., Section 1292:

IT IS ORDERED AND ADJUDGED that the motion of the plaintiff and intervening plaintiff that this case proceed as a class action be and it is hereby denied, and this cause shall proceed in all respects upon the individual complaints as in other cases, subject to a temporary stay of proceedings as ordered below.

This Court being of the opinion that the decision denying class action status in this case as evidenced by the Memorandum Opinion dated September 27, 1975, and as further evidenced by this order, involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal

to the Court of Appeals for the Fifth Circuit may materially advance the ultimate determination of the litigation;

IT IS FURTHER ORDERED that the order denying certification of this case as a class action is hereby certified for appeal pursuant to 28 U.S.C., Section 1292, and all proceedings in this Court are hereby stayed for a period of thirty (30) days pending possible appellate review of the said opinion and order.

SO ORDERED on this the 14th day of October, 1975.

/s/ Walter L. Nixon, Jr.

United States District Judge

Approved As to Form Only:

W. Roberts Wilson, Jr.

Toxey Hall Smith, Jr.

Robert S. Vance

Frederick G. Helmsing

By: /s/ Frederick G. Helmsing

/s/ Vardaman S. Dunn

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 75-8416

ROBERT L. ROPER, and JACK HUDGINS, on Behalf  
of Themselves and all others Similarly Situated,

Petitioners,

versus

CONSURVE, INC., d/b/a BANKAMERICARD CENTER,  
Jackson, Mississippi, and DEPOSIT GUARANTY NA-  
TIONAL BANK, Jackson, Mississippi, a Body  
Corporate,  
Respondents.

On Application for Leave to Appeal from an  
Interlocutory Order

(Filed December 8, 1975)

Before GEWIN, GOLDBERG, and DYER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the inter-  
locutory order of the United States District Court for the  
Southern District of Mississippi entered on October 14,  
1975, is denied.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

CIVIL ACTION No. 4261(N)

ROBERT L. ROPER AND JACK HUDGINS ON BEHALF  
OF THEMSELVES AND ALL OTHERS SIMILARLY  
SITUATED,

Plaintiffs,

vs.

CONSURVE, INC., D/B/A BANKAMERICARD CENTER,  
JACKSON, MISSISSIPPI, AND DEPOSIT GUARANTY  
NATIONAL BANK, JACKSON, MISSISSIPPI, A  
BODY CORPORATE,  
Defendants.

**OFFER OF DEFENDANTS TO ENTER JUDGMENT  
AS BY CONSENT AND WITHOUT WAIVER OF  
DEFENSES OR ADMISSION OF LIABILITY**

(Filed June 1, 1976)

Now come the defendants, subsequent to the order of  
this Court declining to allow this action to proceed as a  
class action under Rule 23 of the Federal Rules of Civil  
Procedure, and would show and represent the following:

1.

Plaintiffs have filed in this cause a motion for sum-  
mary judgment on the original amended complaint filed  
February 28, 1972, and on the supplemental complaint filed  
January 15, 1974, but plaintiffs have represented to the  
Court in writing that, "The named plaintiffs will dismiss  
the Truth-in-Lending issue in this cause," and that a formal  
motion to dismiss would be presented prior to the hearing

on the summary judgment set for June 9, 1976. A copy of the written notice is attached as Exhibit A.

## 2.

The amended complaint filed February 28, 1972 contains a demand for judgment which, as applied to the individual plaintiffs, is as follows:

"1. . . . such . . . sum as represents the aggregate of the following (a) Twice the amount of interest paid within two years next preceding the filing of this complaint . . . and (b) such additional interest as has been charged . . . but not paid . . . within two years next preceding the filing of this complaint.

"2. Any other remedies and relief afforded by the laws of the United States or the State of Mississippi which may be deemed appropriate by the Court.

"3. Cost of this action. . . ."

## 3.

The supplemental complaint filed January 15, 1974 demands judgment as follows:

"WHEREFORE, PREMISES CONSIDERED, Plaintiffs sue and demand judgment on behalf of themselves . . . in the same manner, style and fashion as sought in the original complaint and amended complaints for a supplemental period including the period from the date of the filing of the original lawsuit down to the date of the filing hereof, and Plaintiffs sue and demand damages for themselves . . . in double the amount of interest exacted from them . . . from the time of the filing of the original lawsuit down to, until and including the date of the filing of this supplemental

complaint, and Plaintiffs pray on behalf of themselves . . . that the interest charged but not yet collected be forfeited. . . ."

## 4.

The period covered by the original complaint as amended and the supplemental complaint sometimes referred to as the "suit period" is the period September 18, 1969 through January 15, 1974.

## 5.

Neither the complaint, as amended, nor the supplemental complaint nor the motion for summary judgment reduces plaintiffs' demand to a specific dollar amount, but instead, the complaint seeks recovery of a sum which represents twice the amount of interest paid by plaintiffs and forfeiture of such additional interest as has been charged to plaintiffs but not paid plus the cost of this action and any other remedies and relief afforded by the laws of the United States or the State of Mississippi which may be determined appropriate by the Court.

## 6.

Without admitting any liability and expressly denying the same, defendants do hereby offer to enter judgment, as by consent, to provide that defendants shall pay to each of the plaintiffs, Robert L. Roper and Jack Hudgins, and said individual plaintiffs do have and recover the amount equal to the sum demanded, as aforesaid, in the original complaint as amended and in the supplemental complaint, being a sum equal to double the service charges made during the entire suit period and paid by each of the said named plaintiffs plus a sum equal to the forfeiture of service charges made during the entire suit period but

unpaid plus interest as provided by the laws of the State of Mississippi applicable to plaintiffs' demands and all costs of this action and consequent to such offer, defendants do hereby waive their right to litigate with said plaintiffs the issues of liability to each of them to the extent of the judgment hereby offered to be entered, all without prejudice to or waiver of defendants' right to deny liability for and to litigate issues involving any claims or complaints of any other persons or any other plaintiffs.

7.

This offer is made for the purpose only of avoiding further expense and loss of time to the parties in the prosecution and defense of the individual complaints of the named plaintiffs and without admitting any legal obligations or liabilities whatsoever.

8.

Attached hereto as Exhibit B is a suggested form of interlocutory order and a suggested form of a final judgment which are tendered to the Court for entry pursuant to this offer of judgment.

Respectfully submitted,

Conserve, Inc., D/B/A BankAmericard Center, Jackson, Mississippi,  
and Deposit Guaranty National Bank, Jackson, Mississippi

By: /s/ Vardaman S. Dunn  
Attorney of Record

Of Counsel:

Cox & Dunn, Ltd.  
Post Office Box 1046  
Jackson, Mississippi 39205

(Certificate of Service Omitted in Printing)

### Exhibit A

TOXEY HALL SMITH, JR.

Lawyer

P. O. Drawer 8 Phone 601—928-3222

Wiggins, Mississippi 39577

P. O. Box 836 Phone 601—875-3212

Ocean Springs, Mississippi 39564

May 13, 1976

Mr. James Dukes  
Federal Court Law Clerk  
Federal Courthouse  
Biloxi, Mississippi 39533

Re: Roper vs. Conserve

Dear Jimmy:

This will confirm my telephone call of yesterday to the effect that the named plaintiffs will dismiss the Truth in Lending issue in this cause. I have communicated this information directly to opposing counsel, Vardaman S. Dunn, so he will be aware of our position.

I was reluctant to do this because of the class action aspects of the case. However, I feel that we have the power to do so, without criticism, on behalf of the named plaintiffs and, since this is not a class action at this time it would not be binding upon the class if later certified on appeal or remand.

If the judge desires, I will submit a formal motion to dismiss prior to the hearing on the summary judgment set for June 9, 1976.

Very truly yours,

/s/ Toxey Hall Smith, Jr.  
Toxey Hall Smith, Jr.

THSjr: pa

cc: Hon. Vardaman S. Dunn  
P. O. Box 1046  
Jackson, Mississippi 39205

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

(Title Omitted in Printing)

**ORDER OF DISMISSAL WITH PREJUDICE  
OF TRUTH-IN-LENDING COUNT**

(Filed June 9, 1976)

There coming on for hearing the motion ore tenus by the named plaintiffs to dismiss, with prejudice, the second count of the Complaint relating to the Federal Truth-in-Lending Act and the Court being fully advised in the premises finds said motion should be, and hereby is, sustained.

It is, therefore, ordered and adjudged that the second count of the plaintiff's Complaint, as last amended, relating to the Federal Truth-in-Lending Act is dismissed with prejudice.

ORDERED AND ADJUDGED this the 9th day of June, 1976.

/s/ Walter L. Nixon, Jr.  
United States District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

(Title Omitted in Printing)

**INTERLOCUTORY ORDER ON PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT AND  
DEFENDANTS' OFFER TO ENTER JUDGMENT  
AS BY CONSENT**

(Filed June 9, 1976)

Came on this day to be heard the motion of plaintiffs for summary judgment and the offer of defendants to enter judgment in favor of the plaintiffs, Robert L. Roper and Jack Hudgins, for the amounts demanded in the original complaint, as amended, and in the supplemental complaint (except for the amount demanded in the plaintiffs' alleged "second cause of action" based on an alleged violation of the Federal Truth-in-Lending Act which said second cause of action has been dismissed on plaintiffs' motion), and the Court finding that judgment should be entered in favor of each of the said named plaintiffs for the amounts demanded as offered by defendants, to-wit: For a sum equal to double the service charges made by defendants against each of the said plaintiffs during the entire suit period (September 18, 1969 through January 15, 1974) and paid by each of said named plaintiffs plus a sum equal to the forfeiture of all service charges made during said suit period but unpaid by the plaintiff against whom said charges were made plus interest at the rate of 6% per annum from the respective dates that charges were made or made and paid, as the case may be, plus the plaintiffs' costs of Court, with said judgment to bear interest in turn from its date of entry until paid at the rate allowed by the laws of the State of Mississippi.

IT IS FURTHER ORDERED that plaintiffs prepare and submit to the Court a calculation of the amount for which judgment is to be entered pursuant to the above formula, whereupon final judgment will be entered in favor of the plaintiffs as offered by defendants, said judgment to be without advantage or prejudice to either party on any issues or questions of liability in any further action or proceeding by or in behalf of the named plaintiffs or others.

Plaintiffs have made a counter-offer of judgment which has been rejected by defendants. Plaintiffs do not accept defendants' offer of judgment, and this judgment on defendants' offer of judgment is entered over the objection of the plaintiffs.

IT IS FURTHER ORDERED that plaintiffs submit said calculation of the amount for which judgment is to be entered within 14 days from the date of this order.

SO ORDERED on this the 9th day of June, 1976.

/s/ Walter L. Nixon, Jr.

United States District Judge

Approved As to Form Only:

/s/ (Illegible)

Attorney for Plaintiffs

/s/ Vardaman S. Dunn

Attorney for Defendants

IN THE  
UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

(Title Omitted in Printing)

**PLAINTIFFS' CALCULATION OF DAMAGES**

(Filed June 30, 1976)

NOW COME the Plaintiffs in the above styled and numbered cause, by and through undersigned counsel, and submit the following calculation of damages and interest pursuant to the Court's Interlocutory Order of June 9, 1976, and with respect show the Court as follows, to wit:

I

Plaintiff Robert L. Roper's damages are in the sum of SIX HUNDRED EIGHTY-THREE AND 30/100 (\$683.-30) DOLLARS, plus interest of TWO HUNDRED SIX AND 12/100 (\$206.12) DOLLARS.

II

Plaintiff Jack Hudgins' damages are in the sum of THREE HUNDRED TWENTY-TWO AND 70/100 (\$322.-70) DOLLARS, plus interest of ONE HUNDRED AND 84/100 (\$100.84) DOLLARS.

Respectfully Submitted,

Robert L. Roper and Jack Hudgins

By: /s/ Wm. Roberts Wilson, Jr.

Of counsel for Plaintiffs

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

(Title Omitted in Printing)

**FINAL JUDGMENT ON PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT AND DEFENDANTS'  
OFFER OF JUDGMENT AS BY CONSENT**

(Filed July 15, 1976)

Came on for approval the calculation of the amount for which judgment is to be entered as presented by plaintiffs and pursuant to the interlocutory order heretofore entered in this cause, and the Court finding that plaintiffs' calculation is correct and in conformity with the directions of said interlocutory order and that judgment should be entered accordingly in favor of each plaintiff pursuant to the offer of judgment as made by defendants;

**IT IS ORDERED AND ADJUDGED AS FOLLOWS:**

1. That the plaintiff, Robert L. Roper, do have and recover of and from defendants the principal sum of \$683.30 plus legal interest in the sum of \$200.12, making a total of \$889.42 for which judgment is rendered.
2. That the plaintiff, Jack Hudgins, do have and recover of and from defendants the principal sum of \$322.70 plus legal interest in the sum of \$100.84, making a total of \$423.54 for which judgment is rendered.
3. That the judgment in favor of each of the plaintiffs bear interest at the rate of 8% per annum from its date until paid and that each of the plaintiffs do have and recover their costs of Court to be taxed by the Clerk.

This judgment is entered pursuant to the offer of judgment as made by defendants for the amount demanded by the named plaintiffs in the original complaint, as amended, and in the supplemental complaint as calculated by plaintiffs pursuant to the interlocutory order heretofore entered and is entered without waiver on the part of defendants of any defenses and without admission by the defendants of any liability to the named plaintiffs or others and is without advantage or prejudice to any of the parties or others upon any issue or question of liability to the named plaintiffs or others.

Plaintiffs have made a counter-offer of judgment which has been rejected by defendants. Plaintiffs do not accept defendants' offer of judgment, and this judgment on defendants' offer of judgment is entered over the objection of the plaintiffs.

The defendants may discharge their liability hereunder by depositing the sum awarded herein with the Clerk of the Court, pursuant to Rule 67 of the Federal Rules of Civil Procedure and may take the Clerk's receipt therefor, and the Clerk thereupon shall forthwith remit the amounts adjudged to the respective parties on their request.

SO ORDERED AND ADJUDGED on this the 15 day of July, 1976.

/s/ Walter L. Nixon, Jr.

United States District Judge

Approved as to Form Only

/s/ Frederick G. Helmsing

/s/ Vardaman S. Dunn

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

(Title Omitted in Printing)

**CLERK'S RECEIPT FOR DEPOSIT**

(Filed July 15, 1976)

The undersigned Clerk in and for the jurisdiction aforesaid does hereby acknowledge receipt of the sum of \$889.42 for payment of judgment of Robert L. Roper and the sum of \$423.54 for payment of judgment of Jack Hudgins, pursuant to authorization as contained in the "FINAL JUDGMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' OFFER OF JUDGMENT AS BY CONSENT" dated and entered on the 15th day of July, 1976.

DATED this 15th day of July, 1976.

Harvey G. Henderson, Clerk  
United States District Court

By /s/ I. Henley, D.C.

IN THE  
UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

(Title Omitted in Printing)

**NOTICE OF APPEAL**

(Filed August 10, 1976)

TAKE NOTICE that ROBERT L. ROPER and JACK HUDGINS, on behalf of all others similarly situated to themselves and on whose behalf the named Plaintiffs sought class action treatment, appeal the Judgment entered herein on July 15, 1976, and all prior orders.

/s/ W. Roberts Wilson, Jr.  
Attorney for Plaintiffs

(Certificate of Service Omitted in Printing)

IN THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

No. 76-3600

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF  
OF ALL OTHER SIMILARLY SITUATED,

Plaintiffs-Appellants,

vs.

CONSERVE, INC., d/b/a BANKAMERICARD CENTER,  
AND DEPOSIT GUARANTY NATIONAL BANK,  
JACKSON, MISSISSIPPI, A BODY  
CORPORATE,

Defendants-Appellees.

**MOTION TO DISMISS APPEAL FOR  
WANT OF JURISDICTION**

Now come the appellees, (collectively called "Bank"), and respectfully move the Court for an order dismissing the Notice of Appeal and for cause, would show the following:

1. The case is moot as to the two individual plaintiffs because the plaintiffs have received a money judgment for all relief demanded.

2. The Notice of Appeal does not attempt to appeal from the final judgment in favor of the individual plaintiffs but seeks only an appeal "on behalf of all others similarly situated to themselves and on whose behalf the named plaintiffs sought class action treatment, . . .".

3. The "all other similarly situated" to plaintiffs on whose behalf the appeal is noticed are non-parties and have no standing to request review because there is no certifica-

tion of this case as a "class action" under Rule 23 of the Federal Rules of Civil Procedure.

4. There is no justiciable "case or controversy" before the Court on which jurisdiction may be exercised prudentially or under Article III, § II, of the Constitution of the United States.

The following supporting papers are attached as an Addendum to this Motion: (reference to papers omitted)

Respectfully submitted,

/s/ Vardaman S. Dunn  
Attorney for Appellees

(Certificate of Service Omitted in Printing)

Robert L. ROPER et al.,  
Plaintiffs-Appellants,

v.

CONSERVE, INC., d/b/a BankAmericard Center and  
Deposit Guaranty National Bank, Jackson, Mississippi,  
Defendants-Appellees.

No. 76-3600.

United States Court of Appeals,  
Fifth Circuit.

Aug. 24, 1978.

Credit card holders brought class action against national bank on behalf of all other Mississippi holders of credit cards issued by bank, alleging that charges made were usurious under Mississippi law. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., J., denied certification following evi-

dentiary hearing and, after bank tendered two class representatives payment in full of amount each individually claimed, entered judgment on behalf of plaintiffs, and plaintiffs appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) despite bank's offer to pay off named plaintiffs, named plaintiffs were not precluded from appealing denial of class certification; (2) class representation was adequate, and (3) class action was superior method of proceeding.

Reversed and remanded.

Thornberry, Circuit Judge, specially concurred and filed opinion.

#### **1. Federal Civil Procedure (Key) 1698**

Where there is determination that class is not maintainable, notice requirements of class action rule's dismissal or compromise provision do not apply, at least where dismissal and settlement of action do not directly adversely affect rights of individuals not before court. Fed.Rules Civ.Proc. rule 23(c)(1), (e), 28 U.S.C.A.

#### **2. Federal Civil Procedure (Key) 1696**

By very act of filing class action, class representatives assume responsibilities to members of class, and they may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

#### **3. Federal Courts (Key) 544**

Defendant's satisfaction of representative plaintiffs' claims could not preclude them from appealing denial of class certification nor did it excuse them from their duty of doing so absent express approval by trial court. Fed. Rules Civ.Proc. rule 23(c)(1), (e), 28 U.S.C.A.

#### **4. Federal Courts (Key) 544**

Member of putative class may appeal denial of certification, even though it has been decided that claims of named plaintiff lack merit. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

#### **5. Federal Courts (Key) 544**

An individual plaintiff who has already prevailed in trial court may appeal denial of class certification. Fed. Rules Civ.Proc. rule 23, 28 U.S.C.A.

#### **6. Federal Courts (Key) 544**

Individual plaintiff who loses on merits may appeal denial of class certification. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

#### **7. Federal Civil Procedure (Key) 164**

Even if named plaintiffs in class action had been satisfied with offer of judgment and had not objected, named plaintiffs continued to maintain stake in procuring class-wide relief. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

#### **8. Federal Civil Procedure (Key) 164**

Where only major cost to be advanced before it could be determined whether defendant was liable was that of class notice, where postage for such notice, if individual mailing was required, would have been about \$15,000, where counsel offered to advance that sum looking to named plaintiffs for repayment if required, where named plaintiffs offered note and mortgage on realty as security, and where named plaintiffs' counsel also offered to give bond to guarantee that notice costs would be met, named plaintiffs adequately established their ability to finance litigation for purposes of class certification. Fed.Rules Civ.Proc. rule 23(a)(4), 28 U.S.C.A.

### 9. Federal Civil Procedure (Key) 164

Neither satisfaction nor denial of individual plaintiffs' claims, if effective, necessarily precluded their serving as adequate representative of class. Fed.Rules Civ.Proc. rule 23(a)(4), 28 U.S.C.A.

### 10. Federal Civil Procedure (Key) 182.5

Where credit card holders brought class action against national bank on behalf of 90,000 Mississippi residents who held credit cards issued by bank alleging that charges made were usurious under Mississippi law, where claims were relatively small, averaging less than \$100 each, where question of law involved applied alike to all, where individual fact determinations could be reached by using objective criteria and assistance of computer, and where potential class members could not effectively secure relief by another type of action, and where proposed class was peculiarly manageable plaintiffs were entitled to certification of class. Fed.Rules Civ.Proc. rule 23(b)(3), 28 U.S.C.A.

### 11. Federal Civil Procedure (Key) 182.5

In class action brought by credit card holders against national bank on behalf of all other Mississippi holders of credit cards issued by bank in which plaintiffs alleged that charges made were usurious under Mississippi law, common questions predominated for purposes of satisfying class action rule, and issues unique to each claim were not so complex as to make costs of determination prohibitive or to require individual evidentiary hearings. Fed. Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

### 12. Federal Civil Procedure (Key) 161

Class action rule was designed to prevent problem of wasteful and uneconomical multiple individual actions, Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

### 13. Federal Civil Procedure (Key) 161

Because considering financial impact of judgment in determining whether to certify class, presupposes success on the merits and requires trial court to express an opinion on harshness vel non of particular remedy prior to trial itself, it ought to be allowed only in extreme cases. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

### 14. Federal Civil Procedure (Key) 182.5

Attitude of Mississippi law disfavoring usury suits did not preclude bringing of suit by credit card holders against national bank as class action since action was regulated by federal law and since state law, even if relevant, would yield to federal class action rule. Fed.Rules Civ. Proc. rule 23, 28 U.S.C.A.

### 15. Usury (Key) 82

Under Mississippi law usury claims are penal and are viewed as personal to borrower; aggregation of such claims is condemned.

### 16. Banks and Banking (Key) 270(1)

National Bank Act adopts usury laws of states only insofar as they severally fix rates of interest; sole particular in which national banks are placed on an equality with natural persons is as to rate of interest, and not as to character of contracts they are authorized to make. National Bank Act, 12 U.S.C.A. §§ 85, 86.

### 17. Banks and Banking (Key) 270(1)

Provisions of National Bank Act looking to local law as surrogate federal law for determining permissible interest charges were designed by Congress to place national banks on plane of competitive equality with other lenders in respective states. National Bank Act, 12 U.S.C. §§ 85, 86.

### 18. Federal Civil Procedure (Key) 182.5

Difficulties in management of class action suit brought by credit card holders against national bank did not preclude bringing of suit as class action, where all members of proposed class lived in one state, where defendant had each member's address on computer, where itemized history of each account could readily be obtained, and where substantial costs would be involved only if bank was found to be liable on plaintiffs' usury claims. Fed.Rules Civ.Proc. rule 23(d)(3), 28 U.S.C.A.

### 19. Federal Civil Procedure (Key) 182.5

Possible assertion of counterclaims by national bank in class action brought against it by credit card holders did not preclude bringing of suit as class action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

Appeal from the United States District Court for the Southern District of Mississippi.

Before WISDOM, THORNBERRY, and RUBIN, Circuit Judges.

RUBIN, Circuit Judge:

This case presents two class action questions: whether the class action claim and, indeed, the entire controversy became moot when, after the trial court denied certification following an evidentiary hearing, the defendant bank tendered to the two class representatives payment in full of the amount each individually claimed and judgment was entered on their behalf; and, if not, whether a class action is superior to other available means for the fair and efficient adjudication of a claim for usurious charges on behalf of a class potentially comprising 90,000 holders of credit cards issued by a national bank. Having concluded that the defendants cannot moot the class claim

by attempting to pay off the class representatives, we decide also that a class action is not only superior to other methods but singularly appropriate for the adjudication of this controversy, and, therefore, remand the case for further proceedings.

#### I.

#### Facts

Two holders of credit cards issued on the "BankAmericard" plan sued the national bank that had issued the cards under the National Bank Act, 12 U.S.C. §§ 85 and 86, contending that the charges made were usurious<sup>1</sup> on behalf of themselves and all other Mississippi holders of the same cards issued by the defendant.<sup>2</sup> Under the plan, card holders can buy merchandise or services from third persons who have contracts with the bank or other member banks, and charge their purchases. The merchants then sell the credit instruments to the bank at a discount. The bank bills the card holder; if the payment is not made within a certain time, it charges interest on the unpaid balance. During the suit period, there were 90,000 to 100,000 individual card holders.

The trial court declined to certify the action as a class action. The bank then made an offer of judgment to each of the two individual plaintiffs, without admitting liability, and tendered to each the maximum amount that each could have recovered (\$889.42 and \$423.54, respectively) by depositing this sum in the registry of the court. The two named plaintiffs have never accepted the tender,

1. The complaint alleges the rates exceeded those permitted by Section 36, Chapter 2 of the Mississippi Code (1942) as amended. See Title 75, ch. 17 §§ 1, 17, Mississippi Code (1974).

2. The original complaint also charged a violation of the Truth-in-Lending Statute, 15 U.S.C. § 1640, et seq., but that claim has been dropped.

but judgment based on defendant's offer of judgment was entered over plaintiffs' objection.

The credit card system, as the experienced trial judge correctly stated, is made possible by the use of computers. The computer charges each transaction to the card holder's account. If the credit instrument is placed by the merchant with some other bank, it is transmitted through normal banking channels to the defendant and appropriate funds or credits are transferred to the transmitting bank.

For the bank's convenience, the accounts are divided into ten separate groups, called cycles. The credit card accounts are posted on ten days a month; the charges for holders whose names are in each cycle are posted in one day. The computer is programmed so that, on the billing date, it adds charges, subtracts, credits, adds any finance charge due under the BankAmericard plan and prepares a statement reflecting each transaction. The statement is then mailed to the customer.

The data in the computer is stored on magnetic tapes. These are updated from period to period. Transaction data is not retained permanently on the tapes, however. It is printed (on "printouts"), and the printouts are retained. A microfilm record is made of all charge tickets, credit transactions and statements.

During the period in question, the bank made a monthly service charge of  $1\frac{1}{2}\%$  on the unpaid balance of each account. However, each customer was allowed 30 days within which to pay his account without any service charge; if payment was not received within that time, the computer added to the customer's next bill  $1\frac{1}{2}\%$  of the unpaid portion of the prior bill, which was shown as the new balance. This is the charge contended to be usurious. Thus, if a customer bought merchandise

and the charge slip for this was received by the bank the day after a monthly bill had been mailed to him, he would not be billed for the new charge for almost 30 days, and would then have 30 more days within which to make payment in full without incurring the service charge. On the other hand, an item might be received by the bank on the day before the new statement was prepared, yet the service charge for it would be computed on the same basis as if it were received at the beginning of the month. (When he received his bill, the customer might also elect to pay it in installments; in that case, the service charge was made only on unpaid installments.)

About 35% of the bank's customers did not incur a service charge. For the 65% who did the rate was always  $1\frac{1}{2}\%$  on the unpaid balance; if the effective rate were computed based on the number of days from the date the bank received each charge until it was paid, that effective rate would vary for each customer each month. There was evidence that both the finance fees charged to each card holder and the fees each *actually paid* during the suit period can be tabulated, although this requires clerical assistance in addition to the use of the computer. The plaintiff's expert witness testified that the total cost of such preparation, including computation of the refund due each class member if the action were successful, would be \$45,575.

It is also possible to reconstruct every account in full by again processing the transactions. The plaintiffs' expert estimated the cost of this, if it were required by the court, to be \$125,000. He testified that there are contractors available to perform such services. The defendant's expert testified that, if it were necessary to reconstruct every individual account, the cost might range from \$367,700 to \$3,432,000.

The computer could, of course, easily be used to give notice to members of the class and sort out persons who are not class members (for example, because they opened accounts after the class was certified).

## II.

### Mootness

[1, 2] The notion that a defendant may short circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive. One well-publicized danger in the class action is the possibility that it will be used to collect quick, undeserved damages; this type of effort to establish a quick coup has been called a "strike suit." We have held that prior to certification a class action cannot be dismissed merely because the representatives are satisfied, unless there is notice to the putative class of the proposed dismissal and a determination by the court that the dismissal is proper, as required by Rule 23(e) F.R.C.P. *Pearson v. Ecological Science Corp.*, 5 Cir. 1975, 522 F.2d 171, 177, *cert. denied sub nom.*, 1976, 425 U.S. 912, 96 S.Ct. 1508, 47 L.Ed.2d 762, and cases cited therein. Where, as here, there is a Rule 23(c)(1) determination that the class is not maintainable, the notice requirements of Rule 23(e) do not apply if "dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court." *Id.* By the very act of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. The court itself has special responsibilities to ensure that the dismissal does not prejudice putative members.

[3-6] Even if the court should have permitted the bank to pay off the named plaintiffs, either with their acquiescence or over their objection, this satisfaction of their claims could not preclude them from appealing the denial of certification, nor would it excuse them from their duty of doing so absent express approval by the trial court. See generally, Miller, *An Overview of Federal Class Actions: Past, Present and Future* (Federal Judicial Center, 1977) at 57-63. A member of the putative class may appeal the denial of certification, even though it has been decided that the claims of the named plaintiffs lack merit. *United Airlines, Inc. v. McDonald*, 1977, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423. An individual plaintiff who has already prevailed in the trial court may appeal the denial of class certification. *Gelman v. Westinghouse Electric Corp.*, 3 Cir. 1977, 556 F.2d 699, 701-702, and cases cited therein; *Esplin v. Hirschi*, 10 Cir. 1968, 402 F.2d 94, *cert. denied*, 1969, 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459. An individual plaintiff who loses on the merits may also appeal a denial of certification. *Horn v. Associated Wholesale Grocers, Inc.*, 10 Cir. 1977, 555 F.2d 270, 276-277; *Donaldson v. Pillsbury Co.*, 8 Cir. 1977, 554 F.2d 825, 831, note 5, *cert. denied*, 1977, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128, and cases cited therein. There is no reason why an individual plaintiff to whom payment of his claim has been tendered should have less standing in the light of the judicial responsibility to ensure that class representatives adequately represent the interests of the class and do not settle either their claims or the class action without court approval.

In *Satterwhite v. City of Greenville*, 5 Cir. 1978, ..... F.2d ....., ....., note 10 (slip op. 6531, 6540, note 10), we noted that, if the representative's claim became moot prior to appellate review of a denial of certification based upon a full evidentiary hearing, there are several reasons

for permitting the representative to appeal that decision. In particular, unless the representative is permitted to appeal, whether the alleged error in denying certification will be reviewed will depend upon the intervention of a putative class member who, under *Pearson*, is not entitled to notice of the individual compromise and may be unaware that the putative class is without a representative who has a viable claim. Review of alleged judicial error ought not be foreclosed so fortuitously. Additionally, such intervenors offer inadequate protection because of the possibility that defendant will pay a satisfactory price for their abandoning the appeal.

[7] Constitutional requirements are met: a viable controversy still exists with respect to the maintainability determination. The only issue is who may raise it. Here, plaintiffs have a stake because of their objection to the compromise. However, even had they been satisfied with the offer of judgment, the result would not change; the individual plaintiffs would maintain a stake in procuring class-wide relief. *Gelman v. Westinghouse Electric Corp.*, *supra*. Moreover, they maintain a nexus with the class and, for reasons detailed subsequently, continue to be adequate representatives for purposes of Rule 23(a)(4) despite the mootness of their claims. *See Satterwhite*, *supra*, ..... F.2d at ....., note 11 (slip op. at 3541, note 11); *Long v. Sapp*, 5 Cir. 1974, 502 F.2d 34, 42. Hence, the issue is properly before us on appeal.

### III.

#### The Class Action

The lower court, after several conferences with counsel and a full study of the evidentiary materials, concluded that, although the numerosity, commonality and typicality

requirements of Rule 23(a)(1), (2) and (3) Fed.R.Civ. Proc. are met, the requirement of Rule 23(a)(4) that the plaintiffs fairly and adequately protect the interests of the class is not satisfied because of the inability of the named plaintiffs to finance the case. It found that the requirements of Rule 23(b)(3)<sup>3</sup> were not met because plaintiffs failed to establish that questions of law and fact common to class members predominate, and because a class action is not superior due to: (1) the availability of the traditional procedures for prosecuting individual claims in Mississippi courts; (2) the "horrendous penalty," which could result in "destruction of the bank" if claims are aggregated; (3) the substantive law of Mississippi which views the aggregation of usury claims as undesirable; and (4) the tremendous burden of handling 90,000 claims, particularly if counter-claims are filed. Upon review, we find that the requirements of Rule 23(a)(4) are met, and that the court went beyond the bounds allowed for the exercise of its discretion with respect to the Rule 23(b)(3) determination. *See Shumate & Co., Inc. v. National Association of Securities Dealers, Inc.*, 5 Cir. 1975, 509 F.2d 147, 155, cert. denied, 1975, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97.

3. The court found that the requirements of Rule 23(b)(1) were not met because the prospective class consisted entirely of small claimants who could not afford to litigate their individual actions; hence there was little chance of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . ." and that Rule 23(b)(2) did not apply because the actions were not predominantly for injunctive or declaratory relief. *See Eisen v. Carlisle & Jacquelin*, 1974, 417 U.S. 156, 163, 94 S.Ct. 2140, 2146, note 4, 40 L.Ed.2d 732. It is not necessary for us to review these determinations because of the availability of Rule 23(b)(3) certification. However, we note that the court's finding with respect to Rule 23(b)(1) [that individual actions are unlikely] is inconsistent with its determination that traditional procedures for prosecuting individual actions provide meaningful alternatives to class certification.

### A. Adequacy of Class Representation

[8] No question is raised about the ability and willingness of the named plaintiffs fairly and adequately to protect the interests of the class, but the defendants do question the plaintiffs' ability to finance the litigation.<sup>4</sup> Their counsel are qualified and experienced. *Eisen v. Carlisle & Jacquelin* (*Eisen II*), 2 Cir. 1968, 391 F.2d 555, 562. The only major cost to be advanced before it is determined whether or not the defendant is liable is that of a class notice. See *Oppenheimer Fund, Inc. v. Sanders*, 1978, ..... U.S. ...., 98 S.Ct. 2380, 57 L.Ed.2d 253. The postage for such a notice, if individual mailing is required, would be about \$15,000. Counsel properly offered to advance that sum looking to the named plaintiffs for repayment if required. Their clients offered a note and mortgage on realty as security. Counsel has also offered to give a bond to guarantee that the notice costs will be met. The sufficiency of such action has been established, *Sayre v. Abraham Lincoln Federal Savings & Loan Ass'n*, E.D.Pa.1974, 65 F.R.D. 379, modified, D.C. 1975, 69 F.R.D. 117; *Halverson v. Convenient Food Mart, Inc.*, 7 Cir. 1972, 458 F.2d 927, 931 n. 7.

[9] Neither the satisfaction nor denial of the individual plaintiffs' claims, if effective, necessarily precludes

4. According to Professor Arthur Miller, *An Overview of Federal Class Actions: Past, Present and Future*, (F.J.C.1977), at 32:

There have been instances in which a district judge has concluded that the representatives are inadequate, at least in part, because they do not appear to have the financing to maintain the action. But this is a rather tricky consideration that must be treated with some care because if financial capacity is emphasized, it may mean that poorer claimants will be prevented from maintaining class actions. Accordingly, discretion is required; although the ability to fund the case is a factor, it probably should not be a determinative factor.

their serving as adequate representatives. We have permitted representatives to serve the class despite adjudications determining that their individual claims are not viable if they are members of the class and maintain an adequate nexus with it. *Long v. Sapp*, 5 Cir. 1974, 502 F.2d 34; *Huff v. N.D. Cass Co. of Ala.*, 5 Cir. 1973, 485 F.2d 710, 712-714 (*en banc*). See *Gelman v. Westinghouse Electric Corp.*, 3 Cir. 1977, 556 F.2d 699, 701; *Satterwhite v. City of Greenville*, 5 Cir. 1978, ..... F.2d ....., note 8 (slip op. 6531, 6538, note 8), approving this jurisprudence and distinguishing *East Texas Motor Freight System, Inc. v. Rodriguez*, 1977, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453, on the basis that the named representatives in that case were not members of the class at the time the suit was filed nor at the time of the certification decision. The relevant inquiry is whether the plaintiffs maintain a sufficient interest in, and nexus with, the class so as to ensure vigorous representation. The defendant's decision to confess judgment has not affected the vigor with which plaintiffs have pursued the class claims, and we find no basis for concluding that they have not satisfied the requirements of Rule 23(a)(4).

### B. Superiority of a Class Action

[10] This is a classic case for a Rule 23(b)(3) class action. The claims of a large number of individuals can be adjudicated at one time, with less expense than would be incurred in any other form of litigation. The claims are relatively small, said even by the plaintiffs to average less than \$100 each, and the question of law is one that applies alike to all. While it may be necessary to make individual fact determinations with respect to charges, if that question is reached, these will depend on objective criteria that can be organized by a computer, perhaps

with some clerical assistance. It will not be necessary to hear evidence on each claim.

A number of similar class actions have been certified by district courts,<sup>5</sup> and appear to have been susceptible of management. Certification will achieve one of the primary purposes of the class action, "enhanc[ing] the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." *Hawaii v. Standard Oil Co. of California*, 1972, 405 U.S. 251, 266, 92 S.Ct. 885, 893, 31 L.Ed.2d 184. We consider separately each of the factors that are argued to militate against certification.

### 1. Common Issues

[11] The legal issues, as the trial court correctly noted, are whether the finance or service charge made is subject to the Mississippi statute on usury—for such a charge might be considered exempt from the statute; whether the charge is interest and, if so, what rate of interest is permissible; and whether the rate actually paid in any given case is to be determined on a daily, monthly, or other basis, and what dates are to be used for determination of the rate. If the legal issues are resolved in favor of some or all of the members of the class, there would then be factual questions; whether the permissible rate was exceeded in any given case, and, if so, by what amount.

5. *Cosgrove v. First & Merchants National Bank*, E.D.Va. 1975, 68 F.R.D. 555; *Weit v. Continental Illinois National Bank & Trust Co.*, N.D.Ill.1973, 60 F.R.D. 5, appeal dismissed, 7 Cir. 1976, 535 F.2d 1010; *Cohen v. District of Columbia National Bank*, D.D.C.1972, 59 F.R.D. 84; *Partain v. First National Bank of Montgomery*, M.D.Ala.1973, 59 F.R.D. 56; *Zachary v. Chase Manhattan Bank*, S.D.N.Y.1971, 52 F.R.D. 532, together with a number of other cases reported by published decisions. See dicta in *Fisher v. First National Bank of Omaha*, 8 Cir. 1977, 548 F.2d 255, 262.

In determining these issues, it may (or may not, dependent upon Mississippi law), be important that the effective daily rate or monthly rate paid would vary from one account to another. If Mississippi law proscribes or permits a  $1\frac{1}{2}\%$  charge *per se*, the effective daily rate will be unimportant. If Mississippi law determines whether a charge is usurious depending not on its nominal terms but on the average daily rate charged, then whether the effective rate is based upon the period commencing when the bank receives the bill or when the customer receives the bill may determine whether the rate is usurious. Additionally, if the period ends on the date the charge is actually paid, as opposed to the date the charge is due, the effective rate charged a customer who paid his account five days after receiving a billing showing a finance charge (35 days after the charge was computed at the rate of  $1\frac{1}{2}\%$  a month) would be different from the rate paid by another customer who paid 29 days after receiving the bill (59 days after the charge was compiled).

Thus, it may (or again, may not, dependent on whether any charge made was usurious under Mississippi law, or whether every  $1\frac{1}{2}\%$  charge made was excessive, or whether some other standard applies) be necessary to reconstruct each card holder's account. Neither the trial court nor we can know in advance of a substantive decision whether it is necessary to make a computation (after all, the charge may be valid); or, if it is, how Mississippi law determines what is usurious and by what standards the computations are to be made. The best scenario for the utility of a class action is constructed if the trial court decides that the charge can never be considered usurious; the defendant disposes of 90,000 potential claims in one coup. The worst hypothesis will materialize if the court decides that Mississippi law requires the rate to be computed on each individual account on a daily-rate basis.

Whether the testimony of plaintiffs' expert (who has done a similar job before) or defendant's expert (who obviously fears disaster) be accepted, no computation need be made, and no costs need be incurred until the trial court determines the applicable Mississippi rule and, if Mississippi law appears to create liability, sets standards for its application, perhaps by an inexpensive preliminary sample of accounts.

Hence, common questions predominate for purposes of satisfying Rule 23(b)(3); the issues unique to each claim, if any are raised, are not so complex as to make the costs of determination prohibitive, or to require individual evidentiary hearings.

## 2. Availability of Other Relief

The potential class members cannot effectively secure relief, if any is due, by another type of action. The suggestion by the defendant that each plaintiff might resort to a Mississippi small claims court assumes that the procedures of such courts are adequate for the sophisticated type of claim here presented, and that Mississippi state courts could handle this volume of suits. Moreover, the national bank defendant could remove every such case to federal court. 28 U.S.C. §§ 1337 and 1441(b); see *Partain v. First Nat'l. Bank*, 5 Cir. 1972, 467 F.2d 167. Cf. *Marquette Nat'l. Bank v. First Nat'l. Bank*, D.Minn.1976, 422 F.Supp. 1346.

What is more important is that each plaintiff has the right to seek relief in federal court. If even one-twentieth of them chose to do so, the court would have 5000 suits to dispose of, approximately four times the total number of suits of all kinds filed with its clerk annually.<sup>6</sup> Should

6. Management Statistics for United States Courts 1977, at 60. One thousand two hundred eighty nine (1,289) cases were filed in the Southern District of Mississippi in the twelve month period ending June 30, 1977.

a federal forum be used for such individual actions, the cost of each action would surely increase, as would the cost of determining damages. The alleged statutory wrong may go unchallenged because the costs of proof exceed the likely recovery. See Wright & Miller, *Federal Practice and Procedure*, § 1779 at 61 (1972 ed.).

[12] Even assuming *arguendo* that multiple individual actions were feasible, they would be wasteful and uneconomical. This is precisely the problem that Rule 23 was designed to prevent. "The very purpose to be served by a class action is the opportunity it affords to prevent a multiplicity of suits based on a wrong common to all." *Green v. Wolf Corp.*, 2 Cir. 1968, 406 F.2d 291, cert. denied, 1969, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766.

## 3. Impact on Defendant

In Truth-in-Lending actions, Congress has manifested its concern about suits potentially ruinous to defendants by limiting recovery. 15 U.S.C. § 1691e. There appears to be no comparable limit for class actions under the National Banking Act although recovery is limited in actions of this type to twice the amount of the interest paid. 12 U.S.C. § 86. See *McCollum v. Hamilton Nat'l. Bank*, 1938, 303 U.S. 245, 247, 58 S.Ct. 568, 570, 82 L.Ed. 819; *Coral Gables First Nat'l. Bank v. Constructors of Fla., Inc.*, Fla. App. 1960, 119 So.2d 741; *First Nat'l. Bank v. Lowery*, 1937, 234 Ala. 56, 173 So. 382; *First Nat'l. Bank v. Davis*, 1911, 135 Ga. 687, 70 S.E. 246. We find no evidence that Congress otherwise sought to protect the net worth of national banks against damaging suits if, in fact, they overcharged their customers. If it be assumed, however, that courts should heed hurricane warnings about potential disasters to defendants and use them as a reason to evacuate class actions then, we consider this to be less than catastrophic. If it is assumed that the defendant is correct when it states

that about 35% of the card holders paid no service charge, then the number of potential claimants is 60,000. If the average recovery is \$100 each, the potential liability is large (\$12,000,000) but not ruinous to a defendant with capital accounts of \$45,000,000 and with assets of \$520,000,000.

[13] Unlike the situation under some statutes, we are not concerned with a fixed minimum penalty of a substantial amount for a technical violation, see *Partain v. First Nat'l. Bank of Montgomery*, M.D.Ala.1973, 59 F.R.D. 56, 60-61, that if magnified, would exact a punishment unrelated to statutory purposes. Compare *Ratner v. Chemical Bank N. Y. Trust Co.*, S.D.N.Y.1972, 54 F.R.D. 412. Because considering the financial impact of a judgment presupposes success on the merits and requires the trial court to express an opinion on the harshness *vel non* of a particular remedy prior to trial itself, it ought to be allowed only in extreme cases.

#### 4. Mississippi Usury Law and Aggregation

[14-17] Nor is the attitude of Mississippi law disfavoring usury suits sufficient to deter the entertainment of this class action. Usury claims are penal in Mississippi and are viewed as personal to the borrower; the aggregation of such claims is condemned.<sup>7</sup> *Fry v. Layton*, 191 Miss. 17, 2 So.2d 561.<sup>8</sup> Of course, we deal here with a

7. Class action treatment in the present case is not the same as aggregation of claims. Recovery for each individual member of the class is sought, and for no more than the amount of the illegal interest extracted from each class member and the equal penalty payable to each class member.

8. In *Fry v. Layton*, *supra*, the Mississippi statute required a forfeiture of both interest and principal. The appellee had sought to buy up claims from borrowers of a loan company and thereafter aggregate such claims and recover of the lender both interest and principal. This type of scheme was denominated "legal fraud" by the Mississippi court. 2 So.2d at 565.

claim against a national bank, controlled in matters of procedure by the Federal Rules of Civil Procedure. *John R. Alley & Co. v. Federal Nat'l. Bank of Shawnee*, 10 Cir. 1942, 124 F.2d 995; the action is regulated by federal law, although the federal statute may look to local law as surrogate federal law for determining the permissible interest charges. 12 U.S.C. § 85.<sup>9</sup> As we said in *Partain v. First National Bank of Montgomery*, 5 Cir. 1972, 467 F.2d 167, 173:

This interplay between the federal statute and State usury laws is elucidated by *Evans v. National Bank*, 251 U.S. 108, 40 S.Ct. 58, 64 L.Ed. 171 (1919): "The National Bank Act establishes a system of general regulations. It adopts usury laws of the states only insofar as they severally fix the rate of interest"; by *National Bank v. Johnson*, 104 U.S. 271, 26 L.Ed. 742 (1881): "The sole particular in which national banks are placed on an equality with natural persons is as to the rate of interest, and not as to the character of contracts they are authorized to make . . . ."

(Emphasis added & original)

Hence, the state law with respect to aggregating usury claims that derive from state law is inapposite with respect to claims founded on federal statute, and would yield to Rule 23, F.R.C.P., even if relevant.

9. These provisions of the Act were designed by Congress to place national banks on a plane of competitive equality with other lenders in respective states by adopting state law with respect to permissible interest rates. *Fisher v. First National Bank*, 8 Cir. 1977, 548 F.2d 255; *First National Bank in Mena v. Nowlin*, 8 Cir. 1975, 509 F.2d 872; *Brown v. First Nat'l City Bank*, 2 Cir. 1974, 503 F.2d 114; *Monongaheia Appliance Co. v. Community Bank & Trust, N.A.*, N.D.W.Va., 1975, 393 F.Supp. 1226, *aff'd*, 4 Cir. 1976, 532 F.2d 751.

### 5. Manageability

[18] The case presents no unusual difficulties in class management. While the class is large, it is peculiarly manageable. All the members live in one state, the defendant has each member's address on a computer; both that address and the itemized history of each account can readily be obtained.

After substantive rulings are made on the basic issues of liability and damage computation, the case is so manageable that a computer, either in the bank itself or leased elsewhere, can handle its *administration*—as distinguished from the ultimate computation which may in some instances require clerical personnel. The task is not a particularly difficult one when compared to the work that the bank ordinarily performs on its own computer. Under any theory the work involved in the refund computation procedure will represent only a small fraction of the work originally done on the credit card accounts by the bank's computer operation. The evidence shows that this ordinary work was done with such comparative ease that the computer could also do all of the other work of the bank, plus the work of 60 or 70 other banks under contract with it and continue to advertise for more business.

We do not agree with the trial court that there is a serious possibility that the defendant, "faced with the enormous task of defending these thousands of claims, might be pressured into a compromise settlement or even a compromise on procedure to minimize the enormous cost and disruption of its normal business functions." We do not minimize the effect of "strike actions," and we certainly do not applaud them. But, as we have indicated, the specter of large cost will materialize only if, after a preliminary hearing, it appears likely that damages are actually due a large number of class members. Only then,

after liability is determined, will there be substantial cost, either in defense or in payment of damages.

[19] The lower court alluded to the potential problem of counter-claims. This likewise can be handled, if that point is reached, by adopting standards and classifying the claims. See *Weit v. Continental Illinois Nat'l. Bank*, N.D. Ill. 1973, 60 F.R.D. 5. If the court should conclude at any time that the entire group of counter-claims makes the plaintiffs' claims on behalf of such persons unmanageable, the court has the continuing authority under Rule 23 to issue a supplemental order excluding counter-claim defendants from the plaintiff class or separating and severing the class into two different classes, one with counter-claims and one without counter-claims. As Judge Johnson said in *Partain, supra*:

The potential assertion of counter claims against these few members of the proposed class cannot be allowed to defeat an otherwise valid class action when to do so would effectively deprive thousands of class members of the relief to which they are entitled. At the same time the rights of the defendant should be protected.

59 F.R.D. at 59.

Of course, the easiest way for any court to handle complex class litigation is simply to deny certification; this may have the real effect of permitting a defendant to violate a federal statute either with impunity or minor expense. In the present case few of the individual claimants would have the resources necessary to litigate against a well-financed defendant. This consideration underlies the decision of the Seventh Circuit in *Hohmann v. Packard Instrument Co.*, 7 Cir. 1968, 399 F.2d 711, which found a similar situation a classic one for sustaining the class action

involved. Quoting its prior decision in *Weeks v. Bareco Oil Company*, 7 Cir. 1941, 125 F.2d 84, 90, the court said:

To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.

399 F.2d at 715.

For these reasons, we REVERSE and REMAND to the trial court for further proceedings consistent with this opinion.

THORNBERRY, Circuit Judge, specially concurring:

I write separately to express my views on the mootness issue discussed in Part II of Judge Rubin's thorough and scholarly opinion, which I fully join in all other respects. Although I agree that a defendant should not be able to terminate a class action by tendering a few dollars to a putative class representative, I cannot subscribe to the sweeping dicta in the majority opinion that treats fact situations foreign to the instant case. Here the named plaintiffs strenuously objected to the defendant's "settlement" offer, and it cannot be said that a true settlement took place. The voluntary acceptance by named plaintiffs of such an offer is not involved, however, and I see no need to address the mootness question that it would present.

# UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 76-3600

D. C. Docket No. CA-4261-(N)

ROBERT L. ROPER, ET AL.,  
Plaintiffs-Appellants,

versus

CONSURVE, INC., d/b/a BankAmericard Center, and  
DEPOSIT GUARANTY NATIONAL BANK, Jackson,  
Mississippi,  
Defendants-Appellees.

*Appeal from the United States District Court for the  
Southern District of Mississippi*

Before WISDOM, THORNBERRY and RUBIN, Circuit  
Judges.

## JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

It is further ordered that defendants-appellees pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT  
OFFICE OF THE CLERK

Edward W. Wadsworth                      Tel 504—598-6514  
Clerk                                              600 Camp Street  
New Orleans, La. 70130

October 20, 1978

TO ALL PARTIES LISTED BELOW:

No. 76-3600—Robert L. Roper, et al. vs. Conserve,  
Inc. etc. and Deposit Guaranty Na-  
tional Bank, etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk

By /s/ Clare F. Sachs  
Deputy Clerk

cc Mr. William Roberts Wilson, Jr.  
Mr. Toxey Hall Smith, Jr.  
Mr. Frederick G. Helmsing  
Mr. Champ Lyons  
Mr. Vardaman S. Dunn

LETTER TO CLERK OF FIFTH CIRCUIT FROM  
VARDAMAN S. DUNN

(Filed April 17, 1978)

COX & DUNN, LTD.  
Attorneys at Law  
Deposit Guaranty Building  
Jackson, Mississippi 39205

Vardaman S. Dunn                                      P. O. Box 1046  
William H. Cox, Jr.                                      Telephone 354-3783  
Area Code 601

April 14, 1978

Mr. Edward W. Wadsworth, Clerk  
United States Court of Appeals  
Fifth Circuit  
Room 102, 600 Camp Street  
New Orleans, Louisiana 70130

RE: Robert L. Roper, et al. v.  
Conserve, Inc., No. 76-3600

Dear Sir:

When this case was argued orally on Tuesday, April 11, Judge Thornberry requested that we obtain for the Court a Certificate from the United States District Court Clerk regarding a certain matter involved.

We have obtained the Certificate and the original and three copies are enclosed herewith.

I am also enclosing four extra copies of this letter. Will you please distribute this Certificate and letters to the members of the panel consisting of Judges Thornberry, Wisdom and Rubin and oblige.

Yours very truly,

/s/ V. S. Dunn  
Vardaman S. Dunn

VSD:nc  
Enclosures

cc: Mr. Frederick G. Helmsing

IN THE  
UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

CIVIL ACTION No. 4261 (N)

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF  
OF THEMSELVES AND ALL OTHERS  
SIMILARLY SITUATED,

Plaintiffs,

vs.

CONSERVE, INC., d/b/a BANKAMERICARD CENTER,  
JACKSON, MISSISSIPPI, AND DEPOSIT GUARANTY  
NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY  
CORPORATE,  
Defendants.

**CERTIFICATE OF CLERK**

I, the undersigned Clerk of the Court aforesaid, do hereby certify that the following appears from the record in this office:

1. On July 15, 1976, a receipt was issued by the Clerk to Mr. Vardaman Dunn, tendering \$1,312.96 into the registry of this Court, a true copy of which is attached to this Certificate.
2. The sum of \$1,312.96 has remained and is now in the registry of this Court.
3. Attached hereto is a true copy of the Judgment under which the above payment into the registry of the court was made.

4. There is no record that any request for disbursement from the registry of the Court has been made or filed by either Robert L. Roper or Jack Hudgins.

SO CERTIFIED, this the 14th day of April, 1978.

Harvey G. Henderson, Clerk  
United States District Court

By: /s/ Bobbie J. Price  
Deputy Clerk

(Exhibits Appear Elsewhere in Appendix)